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International Responsibility and the Admission of States to the United Nations

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INTERNATIONAL RESPONSIBILITY AND THE ADMISSION OF STATES TO THE UNITED NATIONS

*Thomas D. Grant**

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* Fellow, Wolfson College; Senior Associate, Lauterpacht Centre for International Law, University of Cambridge. Professor Rüdiger Wolfrum in 1999 discussed the possibility with the author that a “reparative” obligation might arise on the part of the United Nations when admitting certain States to membership. Chapter 7 of the author’s book, *ADMISSION TO THE UNITED NATIONS: CHARTER ARTICLE 4 AND THE RISE OF UNIVERSAL ORGANIZATION* (2009), considers those legal and political effects that are generally understood to result from admission. The present Article picks up from that point to take the matter in the more speculative direction suggested by the earlier discussion. In 2007–08, Dr. Grant was a Jennings Randolph Senior Research Fellow of the U.S. Institute of Peace in Washington, D.C. The views expressed in this Article are not necessarily those of the institutions with which the author is or has been affiliated.

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Admission of a State to the United Nations (U.N., or “the Organization”) entails significant obligations on the part of the admitted State. As provided under Article 4, paragraph 1, the State must be able and willing to fulfill the obligations contained in the U.N. Charter.¹ As provided under Article 17, the State will be assessed certain dues contributions.² Peacekeeping and other U.N. missions, though participation in them is not obligatory, will entail further obligations on the participating States, and the General Assembly has authority to assess those costs across the membership.³ International responsibility may arise where the admitted State does not fulfill these obligations or its conduct breaches other rules. Within the U.N. Charter itself, provisions exist for expulsion⁴ and for various forms of suspension⁵—measures available against the admitted State that fails to fulfill its obligations.

Yet admission is not a matter for the admitted State alone. For a State to be admitted to the United Nations, two things must happen: first, the State must seek admission, and second, the United Nations must decide to grant it. The second part of the operation entails a coordinated act of the existing Member States as constituents of the two main organs of the United Nations; that is, for the United Nations to confer membership on a given State seeking to be admitted, the Charter requires the affirmative recommendation of the Security Council and the decision of the General Assembly to admit the State. Though the obligations and potential international responsibility of the admitted State are relatively clear, less so are the obligations and responsibility of those actors whose decisions resulted in the State being admitted. Considering that the act of

1. U.N. Charter art. 4, para. 1 (“Membership in the United Nations is open to all . . . peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”).

2. *Id.* art. 17.

3. Certain Expenses of United Nations, Advisory Opinion, 1962 I.C.J. 151, 164–67 (July 20).

4. U.N. Charter art. 6.

5. *Id.* art. 5 (discussing suspension of membership with respect to a State subject to preventive or enforcement action); *id.* art. 19 (discussing suspension of General Assembly voting rights with respect to a State “in arrears in the payment of its financial contributions”).

admission is the product of joint decision by the admitted State on the one hand, and by the existing Member States and the Organization on the other, it would be incongruent if admission—an act having particular legal and political consequences at the international level—were to impose obligations only on the admitted State. The present Article asks whether admitting a State to membership in the United Nations entails any responsibility on those parties whose decisions accepted the admitted State's application for membership and, if so, what the particular incidents of that responsibility might be.

The work of the ILC concerning responsibility over the past ten years has brought a significantly greater degree of systematization to that field than existed before. There was a time when responsibility was seen as a subject restricted to the substantive field of investment protection. This narrow conception led the ILC to a dead end, for it simultaneously excluded from the drafting work much of what international law regulates (or seeks to regulate) and encompassed divergent positions that could not be reconciled. International law is more than the law of investment protection, and the law of investment protection stems from bilateral and other arrangements, each distinctive on the terms of treaties adopted.⁶ A shift—and widening—of this conception led the drafting project to concern itself with the secondary rules applicable to all substantive fields.⁷

The ILC in August 2001 adopted Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁸ This brought to fruition a drafting project on a topic that had been selected for codification in 1953⁹ and been headed, successively, by five Special Rapporteurs.¹⁰ ARSIWA by its terms limits itself to the international

6. James Crawford & Tom Grant, *Responsibility of States for Injuries to Foreigners*, in *THE HARVARD RESEARCH IN INTERNATIONAL LAW: A CONTEMPORARY ANALYSIS AND APPRAISAL* 77, 104–05 (John P. Grant & J. Craig Barker eds., 2007).

7. See Int'l Law Comm'n [ILC], *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ¶¶ 76–77, U.N. Doc. A/56/10 (Oct. 24, 2001) [hereinafter *2001 ILC Report*] ("The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.").

8. *Id.* ¶¶ 72–73. The General Assembly "welcome[d]" the International Law Commission's (ILC) draft and commentary text and "commend[ed]" it to the consideration of the Member States. See *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, at 1–2, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (Dec. 12, 2001). For the full text of the ILC draft, see *id.* at 2–13.

9. See G.A. Res. 799 (VIII), at 52, U.N. Doc. A/2630 (Dec. 7, 1953). The ILC did not appoint a special rapporteur for the topic until 1955. See *Summary Records of the 315th Meeting*, [1955] 1 Y.B. Int'l L. Comm'n 190, U.N. Doc. A/CN.4/SER.A/1955.

10. For the Special Rapporteur's final observations on the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), see James Crawford, *The ILC's*

responsibility of States. Article 57 in particular reserves the responsibility of international organizations for future consideration. The ILC upon completion of ARSIWA turned to international organizations as a distinct part of the general law of international responsibility.¹¹ By 2001, when the General Assembly called on the ILC to start work on the topic of responsibility of international organizations,¹² various authorities, including the International Law Association (ILA), already had recognized the topic as meriting study.¹³ Since then, the Special Rapporteur for responsibility of international organizations, Giorgio Gaja,¹⁴ has submitted six reports, and the ILC has proposed draft articles covering chief parts of the topic.¹⁵ The completed ARSIWA and extensively developed draft articles on international organizations furnish a detailed statement of rules in the field of responsibility. The commentary adopted by the ILC in connection with these drafting projects and the observations of States and international organizations transmitted to the ILC during the course of drafting elucidate the proposed and adopted texts. Writers, States, courts, and tribunals, having this material now in hand, have begun to relate particular substantive fields of law to the regime of responsibility.¹⁶

Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect, 96 AM. J. INT'L L. 874 (2002).

11. ILC, *First Report on Responsibility of International Organizations*, ¶ 1, U.N. Doc. A/CN.4/532 (Mar. 26, 2003) (prepared by Giorgio Gaja) [hereinafter *First Report of Special Rapporteur Gaja*]. The initiation of the topic as part of the ILC work program is summarized in ILC, *Report of the International Law Commission on the Work of Its Fifty-Ninth Session*, ¶¶ 325–27, U.N. Doc. A/62/10 (2007) [hereinafter *2007 ILC Report*].

12. G.A. Res. 56/82, ¶ 8, U.N. Doc. A/RES/56/82 (Dec. 12, 2001).

13. Int'l Law Ass'n [ILA], *Second Report on Accountability of International Organizations*, 69 INT'L L. ASS'N REP. CONF. 875 (2000) [hereinafter *ILA London Conference*]; see also *First Report of Special Rapporteur Gaja*, *supra* note 11, ¶¶ 1–3.

14. Mr. Gaja is a Professor of International Law at the University of Florence, Italy and a member of the ILC (1999 to present). See http://untreaty.un.org/cod/avl/pdf/ls/Gaja_bio.pdf (last visited May 31, 2009).

15. For a synopsis of work on the topic, see the ILC website, http://untreaty.un.org/ilc/guide/9_11.htm (last visited May 31, 2009).

16. See, for example, the multiple International Centre for Settlement of Investment Disputes (ICSID) cases involving responsibility of a State toward investors: *inter alia*, for representations concerning zoning law, *MTD Equity Sdn. Bhd. v. Chile*, ICSID (W. Bank) Case No. ARB/01/7, Award, ¶¶ 164–65 (2004); for performance of participation contracts by a State corporation, *EnCana Corp. v. Ecuador*, ICSID (W. Bank) Case No., Award, ¶¶ 154–61 (2006); for ensuring that “litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice,” *Loewen Group v. United States*, ICSID (W. Bank) Case. No. ARB(AF)/98/3, Award, ¶ 123 (2003); but not for “unforeseen geological conditions,” *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID (W. Bank) Case No. ARB/03/3, Decision on Jurisdiction, ¶ 268 (2005).

For writers, see NINA JORGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* (2000); PHOEBE OKOWA, *STATE RESPONSIBILITY FOR TRANSBOUNDARY AIR POLLUTION IN INTERNATIONAL LAW* (2000); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007); Mark Toufayan, *A Return to Communitarianism? Reacting to “Serious Breaches of Obligations Arising Under Peremp-*

To date, the practice of the United Nations in admitting States as new members has been little considered in connection with international responsibility. Yet it is by no means to be excluded *a priori* that responsibility could arise in any given area of practice; international law lays claim to be a general system of regulation, so wherever there is international activity, the possibility exists that the law, and with it responsibility, will follow. Admission of a State as a member of the United Nations is a highly significant area of international activity. It affects the position of the admitted State in public order, and it affects public order generally. Writers have observed in particular that the admission of so many new States in the period of decolonization changed the character of the United Nations from a wartime alliance of States possessing a more or less clear unity of purpose, to a universal organization encompassing all States regardless of governmental system or political interests.¹⁷ The United Nations as it now exists, the make-up of its various subsidiary organs, and the diverse activities in which these engage all can be related back to this practice of admission.

The United Nations as a universal organization admits all States that apply for admission. This approach was not ordained from the start. The U.N. Charter sets out criteria and procedures that were intended to govern admission and, on their terms, would appear to have been designed to limit admission. Under Charter Article 4(1), the Organization is open to "all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."¹⁸ This provision, as well as paragraph 2 of Article 4, received authoritative interpretation by the International Court of Justice (ICJ),¹⁹ and the position initially seemed clear that the admission of States to the United Nations was to be a regulated process. As the Court said in the *Advisory Opinion on Conditions of Admission*, Article 4(1) "clearly constitutes a legal regulation of the question of the admission of new States."²⁰

The position, however, was reached by the end of the first ten years of the Charter era that little, if any, substantive objection would block

tory Norms of General International Law" *Under the Law of State Responsibility and United Nations Law*, 42 CAN. Y.B. INT'L L. 197 (2004); Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798 (2002).

17. See, e.g., GRANT, *supra* note *, at 1.

18. U.N. Charter art. 4, para. 1.

19. Competence of General Assembly for Admission of State to United Nations, *Advisory Opinion*, 1950 I.C.J. 4 (Mar. 3); Conditions of Admission of State for Membership in United Nations, *Advisory Opinion*, 1948 I.C.J. 57 (May 28).

20. Conditions of Admission of State for Membership in United Nations, 1948 I.C.J. 57, at 62–63.

admission of a State to the United Nations. Dag Hammarskjöld, as Secretary-General, said in 1954:

Almost half the countries of Europe are absent from the council tables. It is inevitable that the effectiveness and influence of the United Nations are lessened by this fact, not only as regards the questions of direct concern to Europe, but other problems, too, where the experience of the European peoples would make possible a great contribution towards their solution. This consideration applies also to the peoples in other parts of the world who do not yet have the representation in the United Nations to which their role in world affairs entitles them.²¹

This stated a basis in policy for opening the United Nations to all States. Any selective principle, it was said, must give way in the interest of full representation, lest the “effectiveness and influence” of the Organization be put in jeopardy. Hammarskjöld’s call for universality came amidst a crisis over applications for admission. Some sixteen applicants were denied membership.²² The resultant “logjam” involved the competing East–West blocs and their various preferred candidate States. It took center stage in successive General Assembly sessions until, finally, in 1955, the Member States saw to it that most States awaiting admission were in fact admitted. Few, if any, States seeking admission since have been denied membership,²³ and no application for admission has been long delayed.²⁴ If admission as practiced since the 1950s has not been as the Charter originally conceived it, the question arises whether admission, at least in some instances, has been a breach of Charter obligations.

It also has been observed that readiness to admit States without considering their effective capacity has reduced the incentives to delay independence and, perhaps, has increased the incidence of so-called “failed States.”²⁵ If the consistent practice of admitting applicants to membership has fostered the formation of new States, then admission well may be said to have had injurious effects: a significant minority of

21. The Secretary-General, *Annual Report of the Secretary-General to the Member States on the Work of the United Nations*, at xii, delivered to the General Assembly, U.N. Doc. A/2663 (July 21, 1954).

22. GRANT, *supra* note *, at 64–67.

23. The possible exception was the Republic of Viet Nam (South Viet Nam), which was forcibly absorbed into the Socialist Republic of Viet Nam before either was admitted. The Socialist Republic was admitted in 1977. See G.A. Res. 32/2, U.N. Doc. A/RES/32/2 (Sept. 20, 1977); S.C. Res. 413, U.N. Doc. S/RES/413 (July 20, 1977).

24. These transactions are considered in detail in GRANT, *supra* note *, at 63–99.

25. See GERARD KREIJEN, *The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 45, 86 (Gerard Kreijen et al eds., 2002).

new States in the U.N. era have lacked the effective capacity needed to sustain public order in the territories for which they are responsible, and some non-State communities preceding these might not have sought independence, if they had not had something like a guarantee of U.N. admission. The existence of States lacking effectiveness seems difficult to separate entirely from U.N. admission. Admission is a statement that on the terms of the U.N. Charter must indicate that the admitted entity is a State. Unless statehood is taken to have absolutely no factual or effective dimension,²⁶ the parties that decided to admit an applicant would seem to be saying that the entity has the effective capacity to exist as a State. Few, if any, writers have asked whether admission might include a commitment by those parties to take reparatory measures toward the admitted entity to assure at least its minimum and sustainable effective capacity. An obligation to redistribute wealth across States in the international system, posited by some writers and States,²⁷ perhaps is a special incident of a wider commitment along such lines. The question here to be considered is whether admission, in addition to entailing certain obligations on the part of the State admitted, might impose certain obligations on the parties from whose decisions admission resulted.

Where there is a breach of an obligation, the possibility of responsibility arises. Where there is responsibility, the responsible party faces a further obligation: it must make reparation. Responsibility in international law thus involves a primary obligation—that is, a substantive rule requiring that a party subject to it act or refrain from acting in a specified way; and it involves a secondary obligation—that is, an obligation to make reparation where a breach of a substantive rule can be attributed to a particular actor.²⁸ To speak of responsibility in connection with any particular field of law involves both identifying the substantive obligations existing in that field, and determining whether a given act in breach

26. On effectiveness and statehood, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 37–95 (2d ed. 2007).

27. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 17–56, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome]; Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) [hereinafter Declaration on the Right to Development]. Literature on the topic is extensive. See, e.g., Philip Alston, *The Right to Development at the International Level*, in *THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL* 99–114 (René-Jean Dupuy ed. 1980); see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Philip Alston, *The Case of the Right to Development*, 1988 HARV. HUM. RTS Y.B. 1.

28. See *Report of the International Law Commission to the General Assembly on the Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Pt. 2).

of a substantive obligation attaches to a party.²⁹ A related matter arises, whether a party so determined to be responsible is amenable to any process rendering it accountable for its conduct.³⁰ The present Article considers what identifiable substantive obligations might be relevant to admission; whether admission as practiced has resulted in a breach of obligation; and whether any such breach might impose international responsibility on the international actors involved in the decision to admit new States. The Article further considers what future reparative obligations such responsibility might entail.

Part I begins by considering in brief the application of the concepts of obligation, breach, and responsibility to international organizations. Part II then asks what specific, substantive obligations exist with respect to the admission of States as new members of the United Nations. Three categories of substantive obligations are considered: obligations arising under Charter Article 4; obligations relating to the peace and security functions of the United Nations; and obligations belonging to the general international law rules which subsist outside (or alongside) the Charter. Part III asks what party or parties may be identified as injured parties in connection with admission—a question that one may approach by asking to what party or parties a substantive obligation in this field is owed. The Member States, the admitted State, the United Nations itself, and the “international community as a whole” are possible beneficiaries of the obligation. Part IV examines the problems of attribution and accountability, the former being in this context particularly a problem of the relation between an international organization and its Member States, and the latter being particularly a problem of the underdevelopment of mechanisms, judicial or otherwise, by which to examine claims against an organization.

Even if satisfactory solutions are found for the several problems of applicable obligations, potentially injured parties, and attribution and accountability, there remains the question of what particular injurious consequences might arise from the act of admitting a State to the United Nations. In seeking to identify injurious consequences, properly defined, one must consider problems of causation, for, as in national tort systems, not every harmful result is sufficiently proximate to an act for the actor to bear responsibility for it. This is addressed in Part V. The possibility of

29. For a discussion regarding both the relation between primary and secondary obligation in the scheme of the ILC's work on State responsibility and the “trans-substantive” application of the responsibility regime, see Crawford, *supra* note 10, at 876–79.

30. On mechanisms of accountability for international organizations, see James Crawford, Fifth Steinkraus-Cohen International Law Lecture: Holding International Organisations and Their Members to Account (Mar. 15, 2007), available at http://www.unawestminster.org.uk/pdf/crawford_lecture.pdf (last visited July 7, 2009) [hereinafter Steinkraus-Cohen Lecture].

an obligation to make reparation is considered in Part VI, a matter which leads one to consider the several forms such reparation might take for a “wrongfully admitted State”—if such a situation indeed may be said to exist.

I. THE RELATION BETWEEN OBLIGATION, BREACH, AND RESPONSIBILITY

As in ARSIWA, the draft articles that the ILC has proposed on the topic of responsibility of international organizations express the relation between obligation, breach, and responsibility.³¹ Draft article 3, paragraph 1 provides as follows: “Every internationally wrongful act of an international organization entails the international responsibility of the international organization.”³² According to draft article 3, paragraph 2, “[t]here is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to the international organization under international law; and

31. The later draft articles have followed closely the structure and wording of ARSIWA. According to Gaja:

It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text.

First Report of Special Rapporteur Gaja, supra note 11, ¶ 11, at 6–7. The ILC has received comments suggesting problems with this approach. See, e.g., ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, at 6–7, U.N. Doc. A/CN.4/545 (June 25, 2004) [hereinafter *2004 Comments*] (comment of the International Monetary Fund (IMF) listing as problems (i) the lack of developed reasoning to support borrowing “certain key concepts” from ARSIWA, (ii) the “fundamental[]” difference that States have general competence and international organizations do not, and (iii) the contrast between the “functional[] and organizational[]” similarity of States to one another and the “significant differences among international organizations”); see also ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, at 14, U.N. Doc. A/CN.4/582 (May 1, 2007) [hereinafter *2007 Comments*] (comment by the European Commission); ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, at 3, U.N. Doc. A/CN.4/568 (Mar. 17, 2006) (comment by the World Health Organization (WHO)).

32. ILC, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 1, 2 and 3 Adopted by the Drafting Committee*, art. 3(1), U.N. Doc. A/CN.4/L.632 (June 4, 2003).

(b) constitutes a breach of an international obligation of that international organization.”³³

These provisions may be considered by starting with the concept of the prior international obligation, and proceeding from there to responsibility and resultant future obligations. An obligation must exist in the first place, if a situation is to involve responsibility. Next, a breach of obligation must have occurred.³⁴ Third, the breach must be attributable to the international organization.³⁵ Where these conditions are met, a wrongful act has occurred and international responsibility is established. From responsibility follow certain legal consequences, in particular the obligation to make reparation. The draft articles deal with the legal consequences of an internationally wrongful act under draft articles 31 through 43.

The innovation in the work on state responsibility had been to exclude definitions of substantive prior obligations. From the 1920s through the 1960s, drafters had seen international responsibility as an invitation to codify the entirety of international investment law.³⁶ As noted above, this was too ambitious, for agreement could not be reached as to a globally applicable body of substantive rules concerning the protection of investors. At the same time, it was significantly too narrow, for international responsibility concerns all acts or omissions of a State, not just its activities in a given field such as investment protection. The ILC eventually directed its efforts instead to attribution. The drafting project in this way came to set out rules concerning how and to what entity responsibility may attach. The existence of an international obligation was assumed; it was left to sources outside the Articles to specify the content and origin of the obligation. As ARSIWA Article 12 provides, “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.” Draft article 8, paragraph 1 of the Draft Articles on Responsibility of International Organizations, *mutatis mutandis*, expresses the same relation.³⁷ Breach, then, is an act or omission “not in conformity” with an obligation—whatever that obligation might be. In considering responsibility generally, the reasons are sound for leaving out a catalogue of the substantive obligations contained in international law. In considering responsibility in connection with a spe-

33. *Id.*

34. *Id.* draft art. 3(2)(b).

35. *Id.* draft art. 3(2)(a).

36. Crawford & Grant, *supra* note 6, 86-93.

37. ILC, *Responsibility of International Organizations: Titles and Texts of the Draft Articles Adopted by the Drafting Committee*, art. 8(1), U.N. Doc. A/CN.4/L.666/Rev.1 (June 1, 2005).

cific field of activity—e.g., admission of States to the United Nations—it is necessary however to give at least a tentative description of the prior obligations. It then may be possible to define certain acts or omissions constituting their breach.

It is also necessary, whether considering responsibility as a general topic or its application to a specific field, to say whether a given breach is attributable to the international organization under international law. This is the attribution requirement under the second paragraph of draft article 3. Draft articles 4 through 7 set out the rules of attribution. The character of an international organization as a compound entity comprised of States or other organizations themselves capable of bearing responsibility for internationally wrongful acts is one of several factors distinguishing the international organization from a State. It imparts a certain complexity to the matter of attribution, which the new drafting project has had to address without benefit of direct transposition from ARSIWA.

Finally, if the elements of responsibility obtain in a given situation, then legal consequences follow. The consequences are not the same in all situations. Possible legal consequences of responsibility, set out in draft articles 31 to 43, will differ depending upon the substantive obligation breached and the resulting situation. Certain consequences clearly follow from admission of an applicant to membership in the United Nations. Once admitted, the applicant is a Member State of the United Nations. The Member State—assuming its good standing as a dues-paying member, etc.—then has rights under the Charter to participate in the various principal organs and specialized agencies of the United Nations. Less obvious are the wider legal consequences of admission, both for the Organization and for its Member States. These may include obligations governing the act of admission and secondary obligations that responsibility would trigger for breach. Possible legal consequences of responsibility for admission of States will be considered below.

II. OBLIGATIONS LIMITING THE DECISION TO ADMIT TO MEMBERSHIP

A. Substantive or Primary Obligations Held by International Organizations

The general law of responsibility assumes that the subjects of international law hold certain obligations. Human rights obligations have been the main concern to date of writers considering the substantive obligations of international organizations and of the United Nations in

particular.³⁸ The content of the obligations however does not directly affect the application of the rules of responsibility; the rules have been developed in order to support their application regardless of the obligation in question. To consider responsibility in a particular case or field of activity nevertheless entails specifying the primary, substantive obligation. For that reason, it is necessary for present purposes to consider what obligations might relate to admitting a State to membership in the Organization.

The search for possible obligations in this field leads one to examine both general international law and the law of the Organization—though the latter will have special significance. How exactly obligations under the Charter relate to general international law may present a question of some subtlety. The Charter, as a constitutive instrument, contains “rules of the organization” for purposes of international responsibility, and “[t]he question of the legal nature of the rules of the organization is controversial.”³⁹ One view is that the internal rules, deriving as they do from an international agreement, themselves form part of international law.⁴⁰ Another view, especially associated with European Community law, is that the internal law of an organization “is separate from international law and bears resemblance to the internal law of a State.”⁴¹ The better

38. See, e.g., Chanaka Wickremasinghe & Guglielmo Verdirame, *Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 465, 474 (Craig Scott ed., 2001) (saying that the United Nations is not exempt from international human rights law); see also Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005) (considering substantive obligations of banks in view of putative principles of development, environmental protection, etc.).

39. ILC, *Third Report on Responsibility of International Organizations*, ¶ 18, U.N. Doc. A/CN.4/553 (May 13, 2005) (prepared by Giorgio Gaja) [hereinafter *Third Report of Special Rapporteur Gaja*].

40. See *id.* (citing PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 576–77 (7th ed. 2002)) (quoting Letter from the Legal Counsel of the World Intellectual Property Organization (WIPO), to Legal Counsel, United Nations (Jan. 19, 2005) (“[T]he relations between an international organization and its member States and between an international organization and its agents should be more generally governed by international law, an integral part of which is the rules of the organization.”); MATTEO DECLEVA, *IL DIRITTO INTERNO DELLE UNIONI INTERNAZIONALI* (1962); G. Balladore Pallieri, *Le Droit Interne des Organisations Internationales*, 127 RECUEIL DES COURS 1 (1969)).

41. *Third Report of Special Rapporteur Gaja*, *supra* note 39, at 7 n.23. Pieter-Jan Kuijper thought that the “[ILC] draft may have great difficulty accommodating the special position of the Community, in particular with respect to shared competence with its Member States and in respect of mixed agreements.” Pieter-Jan Kuijper, Remark, *New World Order or a World in Disorder?: Testing the Limits of International Law: The European Union’s New Ambitions*, 99 AM. SOC’Y INT’L L. PROC. 366, 369 (2005). For more on the distinctive position of the European Community/European Union, see Esa Paasivirta & Pieter Jan Kuijper, *Does One Size Fit All?: The European Community and the Responsibility of International Organizations*, 2005 NETH. Y.B. INT’L L. 169; Stefan Talmon, *Responsibility of International*

view is that the "legal nature of the rules of the organization" varies from organization to organization, and also may vary among rules of different object and content.⁴² Those rules which are not strictly internal to the international organization but, instead, are part of the international agreement constituting the organization are among the rules relevant to international responsibility.

International organizations, like States, are subject to diverse primary (that is, substantive) rules. It may be said that no two international organizations and no two States have precisely the same sum total of international rights and obligations. The rights and obligations of every organization and of every State depend upon the international agreements that they have entered into. Each organization and each State holds its own portfolio of agreements, and, moreover, that portfolio is subject to change as its bearer enters into new agreements, abrogates or denounces old ones, and acquires new rights and obligations by way of international dispute settlement.

There has been a tendency among States and international organizations when considering international responsibility to see the process of determining the primary obligations of international organizations as analytically distinct from those of States. To be sure, there is comparatively little international organization treaty practice,⁴³ and so there is a quantitative difference between analyzing the treaty obligations of States and those of international organizations. There is also the centrality of the constitutive instrument as the evidence and delimiter of the international organization's competence; the competence of the State by contrast is said to be plenary. The International Monetary Fund (IMF) in comments on draft article 1 on Responsibility of International Organizations said as follows:

Since there is no existing body of international law on the matter of what constituted a wrongful act of an international organization and the evolution of such a body of law would largely rely on general principles of law, the overriding legal effects of the provisions of the charters of the international organizations, which have been expressly agreed upon and are primary sources of international law, must be made clear.⁴⁴

Organizations: Does the European Community Require Special Treatment?, in *INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER* 405 (Maurizio Ragazzi ed., 2005).

42. *Third Report of Special Rapporteur Gaja*, *supra* note 39, ¶ 21, at 8.

43. Suzuki & Nanwani, *supra* note 38, at 195.

44. *2004 Comments*, *supra* note 31, at 9.

To say that “there is no existing body of international law on the matter” is to take a skeptical view of the possible development of a general international law of international organizations. Elsewhere too in its comments on draft article 1, the IMF expressed doubt that other “international norms” are applicable to international organizations.⁴⁵ In the statement extracted immediately above, the IMF also seems to deny that “general principles” themselves could apply to international organizations or that general principles might influence the development of a law of international organizations: in the IMF’s view, the constitutive instrument is “overriding.” The question is, overriding of what? It is inconceivable that the peremptory rules of international law do not apply to international organizations;⁴⁶ and areas of the law having general application, such as the customary law of treaties, at least in part, must be relevant to all organizations. Other projects aiming to codify the rules of responsibility with respect to international organizations, such as the ILA’s accountability study, have restricted themselves to quite general expressions of shared principle.⁴⁷ Even there the expressions adopted, in certain instances, such as the ILA’s proposed “principle of institutional balance,” refer back to the constitutive instrument of the organization.⁴⁸ The point generally is valid, that the constitutive instrument is central to determining the obligations of an international organization. Less clear is whether this renders the international organization so different from the State as to require a very different analytic approach when codifying the relation between primary rules and international responsibility.

The ILC, in considering the primary obligations held by international organizations for purposes of international responsibility, has firmly adopted the approach it took with respect to States. Draft article 8(1), by extending the system of responsibility to all substantive rules “regardless of [their] origin and character,” embodies this approach. Yet, evidently, not everyone has accepted the “trans-substantive” premise with respect to organizations. The IMF, as suggested above, seems to

45. *Id.* at 9–10.

46. ILC, *Report of the International Law Commission on the Work of Its Fifty-eighth Session*, art. 23(3), U.N. Doc. A/61/10 (Oct. 1, 2006) [hereinafter 2006 ILC Report] (“[P]eremptory norms also bind international organizations. . .”). Draft article 23 is a saving clause with respect to peremptory norms, which remain binding, even in the face of circumstances precluding wrongfulness. The IMF itself later acknowledged the applicability of peremptory norms. 2007 Comments, *supra* note 31, at 5.

47. ILA London Conference, *supra* note 13, at 878–83; 71 INT’L L. ASS’N REP. CONF. 164, 172–83 (2004) [hereinafter ILA Berlin Conference].

48. ILA London Conference, *supra* note 13, at 7; ILA Berlin Conference, *supra* note 47, at 179–80 (providing that “[t]he principle of institutional balance entails that organs of an International Organisation cannot overstep the institutional restraints laid down in the constituent instrument determining how they exercise their powers . . .”).

recommend turning the analysis toward the particular substantive obligations that each organization holds: “[W]hether there is a breach of an international obligation by an international organization can only be determined by reference to the rules of the organization (save in exceptional cases involving peremptory norms. . .).”⁴⁹ Insofar as this would call on the ILC to catalogue the substantive obligations of each international organization (and these are myriad), the IMF’s position would reintroduce the matter of the primary obligation into the codified rules of responsibility. Bringing the primary obligation into the drafting project would upset the scheme that the ILC adopted after realizing that to state all substantive obligations in international law is impractical. The IMF is not the only participant that would counsel such a retrograde motion. China, in its comments before the Sixth Committee in 2007, expressly called for a re-introduction of primary rules into the ILC’s consideration of the topic:

[T]he ILC should not lose sight of the study of primary rules of international law in connection with responsibility of international organizations. As breach of their international obligations constitutes a precondition for incurring responsibility, a clear definition on the rights and obligations of international organizations is essential for the codification to be based on a solid foundation.⁵⁰

Writers have suggested that the primary obligations are in fact a focal point of the ILC’s work on the responsibility of international organizations. Maja Smrkolj, for example, refers to “a contested topic of public international law that has also been occupying the [ILC] under the notion of responsibility of international organizations, namely human rights obligations of international organizations.”⁵¹ Though a debate may be underway as to the primary obligations that apply to a given organization or to organizations generally, it is a debate the ILC has been clear that it should not enter.⁵² The primary obligations held by international organizations are extremely diverse, their sources widely scattered, and, in some instances, susceptible to differing interpretations. The difficulty in

49. 2007 Comments, *supra* note 31, at 8.

50. Liu Zhenmin, Deputy Permanent Representative of China to the United Nations, Statement at the Sixth Committee of the 62nd Session of the U.N. General Assembly: Report of the International Law Commission on Responsibility of International Organizations (Oct. 29, 2007), as reprinted in Zhu Lijiang, *Chinese Practice in Public International Law: 2007 (II)*, 7 CHINESE J. INT’L L. 735, 766 (2008).

51. Maja Smrkolj, *International Institutions and Individualized Decision-Making: An Example of UNHCR’s Refugee Status Determination*, 9 GERMAN L.J. 1779, 1792 (2008).

52. ILC, *Report on the Fifty-Seventh Session*, ¶ 207, draft art. 8(1), U.N. Doc. A/60/10 (Sept. 23, 2005) [hereinafter 2005 ILC Report].

specifying the primary obligations for purposes of responsibility certainly does not obtain to a much lesser degree for organizations than for States. The grounds for continuing the ILC's approach seem clear enough.

It may be some time before codifiers, States, and international organizations agree as to how to deal with the primary obligations of the international organization. Comment and practice will differ as to the degree of specificity with which the primary obligations should be incorporated into the rules of responsibility; and so too will they differ as to the relative weight to be accorded the constitutive instrument and rules (or principles) of general application. However, that the positions adopted in these matters so far are provisional by no means precludes an inquiry into obligations relating to a particular field of international organization activity. It now falls to consider what obligations might exist with respect to admission of States to the United Nations, both under the Charter and under general international law.

B. Rules Relating to Admission to the United Nations

1. Article 4 of the Charter

Publicists, governments, and the ICJ, though they have not developed the idea to any great extent, have suggested that by casting a vote in favor of admission of an applicant to the United Nations, the voting Member State acts under certain obligations, or that the Organization as an entity, in reaching a decision whether to admit an applicant to membership, itself acts under certain obligations. According to Comment (4) to draft article 8 on Responsibility of International Organizations, "[f]or an international organization most obligations are likely to arise from the rules of the organization."⁵³ Article 4, as part of the Charter, contains "rules of the organization" as defined in the draft articles.⁵⁴ Charter Article 4 is an obvious starting point for considering possible obligations respecting admission.

As previously noted, substantive admission criteria were largely elided in practice after 1956. Yet the ICJ said in its *Advisory Opinion on Conditions of Admission*⁵⁵ that there are conditions that a State may *not* consider when deciding how to cast its vote on an application for admission. Linking an affirmative vote on admission of one applicant to the admission of another applicant—to give the main example that the Court

53. *Id.* at ¶ 206.

54. ILC, *Report on the Fifty-Sixth Session*, ¶ 72, U.N. Doc. A/59/10 (Sept. 16, 2004) [hereinafter 2004 ILC Report].

55. Conditions of Admission of State for Membership in United Nations, Advisory Opinion, 1948 I.C.J. 57 (May 28).

examined in 1948—the Charter prohibits.⁵⁶ To speak of prohibition is of course to speak of obligation. The State casting its vote on admission, it follows from the 1948 Advisory Opinion, is obliged to restrict itself to the five criteria set out in Article 4(1).

It also is clear that the Security Council and General Assembly act under Charter obligations as well, in particular the obligations set out in paragraph 2 of Article 4. Whatever changes practice has effected upon Article 4, paragraph 1, the mechanisms of admission set out in paragraph 2 have remained intact. Paragraph 2 makes a constitutional allocation of competence concerning admission. A declaration by the General Assembly that it had admitted an applicant even though the Security Council had not recommended admission would be *contra legem*.⁵⁷ An obligation exists, then, to observe the constitutional law concerning mechanisms for admission of States.

2. Obligations Relating to the Charter Guarantee of International Peace and Security

Article 4 as seen above contains substantive criteria for admission (paragraph 1) and a mechanism to control the process of admission (paragraph 2). Other substantive provisions of the Charter relate directly to the purpose of the United Nations to maintain international peace and security. The entire apparatus of Chapter VII (concerning action with respect to threats to the peace, breaches of the peace, and acts of aggression), not to mention Chapter V (constituting the Security Council), are among the central provisions in this field. The European Court of Human Rights (ECtHR) has noted the centrality of the peace and security function to the purposes of the United Nations.⁵⁸ States and the ICJ have suggested that these provisions of the Charter give rise to substantive obligations in the matter of admission.

The advisory proceedings of 1948 occasioned several statements about the obligations of Member States when casting votes on admission. Yugoslavia took the position that States in the Security Council possess an extensive discretionary power when voting on admission.⁵⁹ This power existed however not for its own sake, but rather for the purpose of fulfilling the Security Council's function as principal organ for

56. *Id.* at 62–63.

57. Competence of General Assembly for Admission of State to United Nations, Advisory Opinion, 1950 I.C.J. 9 (Mar. 3).

58. *Behrami v. France*, App. No. 71412/01, & *Saramati v. France*, App. No. 78166/01, 45 Eur. H.R. Rep. SE10, ¶¶ 20, 148 (2007).

59. Competence of General Assembly for Admission of State to United Nations, 1948 I.C.J. Pleadings 82 (Apr. 23, 1948).

maintaining international peace and security. According to Yugoslavia (for which Milan Bartoš appeared as representative),

le Conseil de Sécurité, prenant la décision d'admettre un État candidat comme Membre, ne discute pas seulement la question de savoir si le candidat a rempli les conditions fondamentales sans lesquelles il ne peut pas être admis dans l'Organisation, mais également la question de savoir si, en procédant de cette façon, on ne met pas en doute le maintien de la paix et de la sécurité internationale et de la collaboration internationale, prise en générale.

Par conséquent, il ne s'agit pas de considérer isolément si, du point de vue juridique, un État peut ou ne peut pas être Membre de l'Organisation des Nations Unies. Il s'agit également d'apprécier les conséquences futures de cet acte sur la stabilité internationale générale et sur la paix.⁶⁰

Here, Yugoslavia drew a connection between the Security Council's peace and security role and its admission of new Member States. An existing Member State when casting its vote is obliged to consider the five criteria relating to the applicant State ("les conditions fondamentales sans lesquelles il ne peut pas être admis dans l'Organisation"); and it is also obliged to consider the function of the Security Council as guarantor of peace and security ("on ne met pas en doute le maintien de la paix et de la sécurité internationale"). That the role of the Security Council respecting peace and security is obligatory cannot be doubted. The role is certainly not elective; it belongs to the Council's obligations under the Charter. It well may be the Council's main obligation. It has priority in the Charter: the first clause of the first paragraph of Article 1 designates maintenance of international peace and security as one of the "Purposes of the United Nations." From this, it stands to reason that the five criteria in Article 4(1) are not to be taken in isolation—which is to say that the Security Council in all its actions must consider its duties concerning peace and security. Broadly, then, two obligations exist relative to admission under the Charter: the obligation to restrict an affirmative vote to those applicants fulfilling the five criteria of Article 4(1) and the obligation to restrict further an affirmative vote to those applicants whose admission will not jeopardize international peace and security. Both obligations would apply to the individual Member State when casting its vote on a question of admission. They would also apply to the United

60. *Id.*

Nations as a whole, for the final decision respecting an application for admission is a decision, not of a Member State, but of the Organization.

Manfred Lachs, as representative for Poland, had a similar view. According to Lachs, "if one uses a right it should be used in the interest of what it is meant for, in this case in the interest of peace and security."⁶¹ This was again in reference to the casting of a vote in the Security Council on an application for admission. Albeit briefer than the Yugoslav statement, the Polish statement also suggested the connection between a decision to admit an applicant to membership and an obligation under the law of the Charter relative to peace and security.

Judge Alvarez in his Individual Opinion in the *Admission* case shared the view that admission of States is related to the duty of the United Nations to protect international peace and security. "Cases may arise," Judge Alvarez said, "in which the admission of a State is liable to disturb the international situation Consequently, even if the conditions of admission are fulfilled by an applicant, admission may be refused."⁶² Judge Alvarez went on to say that such cases would be political rather than legal and therefore would fall outside the jurisdiction of the ICJ. This was to step back from saying that a legal obligation exists to consider applications for admission in view of the implications of admission for international stability. To call the cases political was to distance them from international law. The general point nevertheless remains: admission has effects relative to peace and security in the international system.

The dissenting judges in the *Admission* case talked about international peace and security as well. According to Judges Basdevant, Winiarski, McNair, and Read,

[u]pon the Security Council, whose duty it is to make the recommendation, there rests by the provisions of Article 24 of the Charter "primary responsibility for the maintenance of international peace and security"—a purpose inscribed in Article 1 of the Charter as the first of the Purposes of the United Nations. The admission of a new Member is pre-eminently a political act, and a political act of the greatest importance.⁶³

Unlike the statements of Yugoslavia or Poland, the dissent here emphasized the obligation as one belonging to the Organization rather than to the Member States. The dissenting judges nevertheless concurred that peace and security is relevant to decisions concerning admission. The

61. *Id.* at 109.

62. Competence of General Assembly for Admission of State to United Nations, 1948 I.C.J. 57, 71.

63. *Id.* at 57, 85.

dissenting judges, unlike Judge Alvarez, apparently saw the peace and security function as a legal duty, not a political discretion.

The second advisory case concerning Article 4, *Competence of the General Assembly*, also raised the question of how the decision to admit an applicant might bear on general considerations of international peace and security. Australia in particular had persistently expressed the view in other U.N. organs that “the recommendation that the Security Council could make on the admission of a new Member could concern only matters relating to security.”⁶⁴ The Court rejected this interpretation of Security Council powers as too narrow.⁶⁵ This by no means, of course, is to say that security somehow falls outside the Council’s constitutional competence. The Charter plainly defines the Security Council as the chief organ concerned with “matters relating to security.” Australia’s statement notes one of the undoubted functions of the Council—indeed, the function so central to the Council as a constitutional organ of the Charter that it is difficult to see how that function could be ignored in any substantive decision that the Council takes, whether pertaining to admission or to other subjects. As the decision to recommend a State for admission is substantive, it stands to reason that the security function must operate when the Security Council reaches the decision.

These were some of the early statements concerning peace and security in the context of admission of new members. The treatment of the application of Macedonia for membership in the early 1990s also suggested a nexus between security and admission of new members. Greece expressed concern that the title “Macedonia,” if not qualified in some way, implied a claim against the territorial integrity of Greece.⁶⁶ The United Nations admitted Macedonia under a special title—“the former Yugoslav Republic of Macedonia” (FYROM).⁶⁷ This gave rise to considerable controversy⁶⁸ and protest from the admitted State.⁶⁹ Yet considerations of peace and security were hard to remove from any pol-

64. Statement of Australia, *Competence of General Assembly for Admission of State to United Nations*, 1950 I.C.J. Pleadings 33, 57 (Mar. 3, 1950).

65. *Competence of General Assembly for Admission of State to United Nations*, Advisory Opinion, 1950 I.C.J. 9, 10 (Mar. 3).

66. See, e.g., Letter from Michael Papaconstantinou, Minister of Foreign Affairs of Greece, to the President of the U.N. Security Council, Annex, U.N. Doc. S/25543 (Apr. 6, 1993).

67. S.C. Res. 817, ¶ 2, U.N. Doc. S/RES/817 (Apr. 7, 1993).

68. See Case C-120/94, *Comm’n v. Greece*, 1996 E.C.R. I-1513 (removal from the register); Case C-120/94R, *Comm’n v. Hellenic Republic*, 1994 E.C.R. I-3037 (denial of Article 186 interim measures); see also Implementation of Article 11, Paragraph 1 of the Interim Accord of 13 September 1995 (*Fmr. Yugo. Republic of Maced. v. Greece*) (Application) (Nov. 13, 2008), available at <http://www.icj-cij.org/docket/files/142/14879.pdf> (last visited June 17, 2009).

69. See, e.g., U.N. GAOR, 47th Sess., 98th plen. mtg. at 17–21, U.N. Doc. A/47/PV.98 (Apr. 8, 1993) (speech of President Gligorov upon admission of Macedonia to the United Nations).

icy respecting the Balkans in the 1990s. Macedonia had applied for admission to membership at a time when the Balkan region was embroiled in civil wars. States and international organizations expressed concern that the civil wars of the region might intensify, spread, and threaten security elsewhere. If there exists a situation in which admission merited application of a cautionary rule relative to security, it was the admission of new States in the Balkans in the 1990s.⁷⁰

The FYROM however has remained a special case. Since its independence, additional States have come into existence in the Balkans and the Security Council has not taken such precautionary steps with respect to their admission. As of May 2009, the last State to be admitted to the United Nations was Montenegro. Representatives in the General Assembly noted at the time of admission that Montenegro had established its independence from the Serbia-Montenegro union through democratic processes and consent.⁷¹ The General Assembly President saw the process by which Montenegro gained independence as “demonstrating its adherence to democratic values and principles and the rule of law.”⁷² Turkey “commend[ed] both the Republic of Serbia and the Republic of Montenegro for the peaceful manner in which they concluded the dissolution of Serbia and Montenegro” and noted that the May 21, 2006 independence referendum had been carried out “in accordance with the constitutional charter of the State Union of Serbia and Montenegro.”⁷³ Ireland praised the “democratic decision” taken “according to procedures agreed with the Republic of Serbia.”⁷⁴ The several references to democracy and rule of law are interesting in their own right, for they suggest that these principles are being further entrenched at international level. The statements also reflect the concern of the United Nations and its constituents that admission of a new State be carried out with a view

70. The position which writers generally have taken, however, has been that the legal basis for the qualified title was doubtful. See, e.g., Matthew C.R. Craven, *What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood*, 1995 AUSTL. Y.B. INT'L L. 199; Igor Janev, *Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System*, 93 AM. J. INT'L L. 155 (1999); Photini Pazartzis, *La reconnaissance d'une ex-République Yougoslave: La question de l'ancienne République Yougoslave de Macédoine (ARYM)*, 41 ANNuaire FRANÇAIS DE DROIT INTERNATIONAL 281 (1995); Michael C. Wood, *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties*, [1997] 1 MAX PLANCK Y.B. U.N. L. 231, 238 (1997); see also Roger O'Keefe, *The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States*, 2001 BALTIC Y.B. INT'L L. 167, 177–79.

71. On behalf of the European Union, Mr. Pfanzelter (Austria) “commend[ed] the peaceful and democratic way in which Montenegro gained its independence.” U.N. GAOR, 60th Sess., 91st plen. mtg. at 6, U.N. Doc. A/60/PV.91 (June 28, 2006).

72. *Id.*

73. *Id.* at 7.

74. *Id.* at 8.

to peace and security. If Montenegro had established its independence without consulting with or gaining consent from the union of which it had been part, then this would have introduced a further irritant to Balkan politics. In such a situation, affirmation of Montenegro's independence may have merited delay. The manner in which Montenegro in fact established its independence, however, raised no concerns relative to peace and security.

The statements noted above are the extent of practice arising out of the admission of Montenegro. The case offers no further evidence that peace and security are becoming entrenched as a consideration relevant to applications for admission. The General Assembly adopted the resolution admitting Montenegro by acclamation.⁷⁵ The antecedent Security Council Presidential Statement of June 22, 2006 was pro forma,⁷⁶ as was the Report of the Committee on the Admission of New Members.⁷⁷ In light of the recent history of the region to which Montenegro belongs, it is noteworthy that the Security Council Committee on the Admission of New Members saw no need to indicate on the record that it had considered the implications for peace and security entailed by the creation of another State. The process by which Montenegro established its independence was exemplary; if concerns relating to the regional environment had arisen, perhaps the absence of any serious local political problems assuaged them.

To date, Kosovo has not presented an application for admission to the United Nations. States objecting to Kosovo's declaration of independence referred to supposed threats to peace and stability.⁷⁸ The same States likely would object in similar terms to the Kosovar application for admission, should one be made. No question of admission arises where no entity seeks to be admitted.

It is difficult to draw general conclusions from the practice to date. A principle may exist that, when the United Nations takes a decision on admitting a new member, it should do so with a view to the peace and security implications of the decision. Practice does not give strong indi-

75. Press Release, U.N. General Assembly, General Assembly Approves Admission of Montenegro to United Nations, Increasing Number of Member States to 192, U.N. Doc. GA/10479 (June 28, 2006).

76. See U.N. SCOR, 61st Sess., 5473d mtg., U.N. Doc. S/PRST/2006/27 (June 22, 2006).

77. See U.N. Sec. Council, Comm. on Admission of New Members, *Montenegro's Admission to the U.N.*, U.N. Doc. S/2006/425 (June 21, 2006).

78. See, e.g., Vuk Jeremić, Op-Ed., *One Nation, Indivisible*, N.Y. TIMES, Feb. 27, 2008, at A25 (speaking as Foreign Minister of Serbia). But see Press Release, U.S. Dep't of State, U.S. Recognizes Kosovo as Independent State (Feb. 18, 2008), available at <http://www.america.gov/st/peacesec-english/2008/February/20080218144244dmslahrellek0.9832117.html> (last visited June 1, 2009).

cations that the United Nations or its Member States accept this as obligatory.

3. Obligations Under General International Law

That international organizations are not parties to most treaties presents a glaring contradiction to the professed principle of responsibility of international organizations under international law. If they are not bound by most treaties, what are the applicable laws regulating the conduct of international organizations? What remains is customary international law, which creates obligations for international organizations in addition to those they voluntarily assume under international treaty law. International organizations are, as stated by the ICJ in the WHO case, "bound by any obligations incumbent upon them" under customary international law.⁷⁹

Whether or not a "contradiction" arises from the limited treaty practice of organizations, it is certainly right to say that customary international law—that is, general international law—applies to international organizations. Certain obligations under general international law would seem to be relevant to the admission of an applicant to the United Nations.

International law rejects the creation of a State as a means to effectuate a policy that violates a *jus cogens* rule. The main illustration of the rule is found in international treatment of Apartheid South Africa's policy of declaring certain parts of its territory "independent" Homelands.⁸⁰ The Homelands were putative States separated from South Africa by unilateral South African declarations, and their purpose was not to secure the rights of the Homeland inhabitants but, rather, to strengthen Apartheid.⁸¹ The unlawfulness of Apartheid as a political system was well-established.⁸² No State, except South Africa, recognized the Homelands as States.⁸³ International law similarly rejects that a putative State may exist otherwise to shield its parent from legal responsibility. For example, the inhabitants of a territory for which a State has responsibility under international law may look to the State for redress, even where the State claims that the territory constitutes another State. The main

79. Suzuki & Nanwani, *supra* note 38, at 195 (quoting Interpretation of Agreement of 25 March 1951 Between WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89–90e).

80. JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 98–108 (1987).

81. *Id.*; see also G.A. Res. 34/93A, ¶ 6, U.N. Doc. A/RES/34/93 (Dec. 12, 1979); G.A. Res. 34/93G, ¶ 1, U.N. Doc. A/RES/34/93 (Dec. 12, 1979).

82. International Convention on the Suppression and Punishment of the Crime of Apartheid art. I, Nov. 30, 1973, 1015 U.N.T.S. 243.

83. DUGARD, *supra* note 80, at 100.

cases have been secessionist entities supported by foreign military intervention, such as the Turkish Republic of Northern Cyprus⁸⁴ and Gagauzia.⁸⁵ The South African Homelands, despite the ambition of their patron, never gained admission to the United Nations. The secessionist entities in Cyprus, Moldova, and Georgia are not U.N. members and would not be admitted under present circumstances. The United Nations more generally will reject the putative creation of a State in breach of self-determination, and States may express objections to admission in terms of self-determination as well. The USSR, for example, objected to the dissolution of the Strategic Trust Territory of the Pacific Islands, a measure resulting in the emergence of several new States. The Territory, said the USSR, had a right to remain a single entity and to gain independence as such; the emergence of several States from the Territory, the Soviets said, violated the right to self-determination of the whole.⁸⁶ The USSR expressed this objection when it came time to consider the admission of these States to U.N. membership.⁸⁷ Democratic processes in the territory, however, affirmed the will of the inhabitants to establish several new States.⁸⁸ No veto was cast, and the United Nations admitted Palau, the Federated States of Micronesia, and the Marshall Islands in the normal way.⁸⁹

The decolonization provisions of the Charter also may be relevant to responsibility for admission.⁹⁰ The Charter obliges the administering

84. Cyprus v. Turkey, 2001-IV Eur. Ct. H.R., ¶¶ 13–15 (quoting *Loizidou v. Turkey*, App. No. 15318/89, 1996-VI Eur. Ct. H.R., ¶¶ 16–17).

85. See *Ilașcu v. Moldova*, 2004-VII Eur. Ct. H.R., ¶¶ 111–36.

86. MASAHITO IGARASHI, ASSOCIATED STATEHOOD IN INTERNATIONAL LAW 216–17 (2002).

87. CRAWFORD, *supra* note 26, at 337 (noting the Soviet protest before the Trusteeship Council).

88. IGARASHI, *supra* note 86, at 189.

89. S.C. Res. 963, U.N. Doc. S/RES/963 (Aug. 9, 1991) (Palau); S.C. Res. 703, U.N. Doc. S/RES/703 (Aug. 9, 1991) (Federal States of Micronesia); S.C. Res. 704, U.N. Doc. S/RES/704 (Aug. 9, 1991) (Marshall Islands). The General Assembly adopted the resolutions on admission without vote. Admission of the Republic of Palau to Membership in the United Nations, G.A. Res. 49/63, U.N. GAOR, 49th Sess., 89th plen. mtg., U.N. Doc. A/RES/49/63 (Dec. 15, 1994) (Palau); Admission of the Federated States of Micronesia to Membership in the United Nations, G.A. Res. 46/2, U.N. GAOR, 46th Sess., 1st plen. mtg., U.N. Doc. A/RES/46/2 (Sept. 17, 1991); Admission of the Republic of the Marshall Islands to Membership in the United Nations, G.A. Res. 46/3, U.N. GAOR, 46th Sess., 1st plen. mtg., U.N. Doc. A/RES/46/3 (Sept. 17, 1991).

90. For an analysis of the Charter and decolonization generally, see Ulrich Fastenrath, *Declaration Regarding Non-Self-Governing Territories*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1089–97 (Bruno Simma ed., 2d ed. 2002); Rudolf Geiger, *The Trusteeship Council*, in THE CHARTER OF THE UNITED NATIONS, *supra*, at 1129, 1129–38; Dietrich Rauschning, *International Trusteeship System*, in THE CHARTER OF THE UNITED NATIONS, *supra*, at 1117, 1117–28; see also ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 71–89 (1995); DUGARD, *supra* note 80, at 63–70; ANDRÉS RIGO SUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION: A STUDY OF

power to “develop self-government” in colonial territories for which it is responsible.⁹¹ The General Assembly eventually said that the administering power’s obligation includes implementing the choice of final disposition, which the people of the colonial territory may choose, including independence as a new State.⁹² Admission perhaps has some relation to this, for to deny the new State the advantages of membership would be to impede the fuller political consolidation that self-government would seem to entail. More will be said about decolonization below, in connection with reparation.

III. BREACH AND THE PROBLEM OF THE INJURED PARTY

Assuming that a relevant obligation exists, responsibility may arise where breach of that obligation occurs. Breach entails an injured party. In many situations, identifying the injured party is straightforward. A diplomat is detained and the archives of the embassy impounded in breach of Articles 26 and 27 of the Vienna Convention on Diplomatic Relations;⁹³ the conduct is an injury to the sending State.⁹⁴ A foreign investor is stripped of regulatory permission to carry out its intended business in breach of the fair and equitable treatment clause of a bilateral investment treaty between the State of the investor’s nationality and the host State; assuming that the treaty contains a clause giving the investor a right to arbitrate against the host State, the injury may be treated as an injury to the investor.⁹⁵ In some situations, however, questions may arise as to what party the breach has injured. The present section will consider the relation between breach and obligation; and the question of what entity precisely might be injured by a breach of obligations concerning admission of States.

UNITED NATIONS PRACTICE 53–94 (1973); Jost Delbrück, *Selbstbestimmung und Dekolonisation*, in *DIE VEREINTEN NATIONEN UND DIE MITARBEIT DER BUNDESREPUBLIK DEUTSCHLAND* 69, 73–99 (Ulrich Scheuner & Beate Lindemann eds., 1973); Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo*, 28 GA. J. INT’L & COMP. L. 9, 26–33 (1999).

91. U.N. Charter art. 73.

92. G.A. Res. 1541 (XV), Annex, princ. VI, U.N. GAOR, 15th Sess., 948th plen. mtg., U.N. Doc. A/4684/Annex (Dec. 15, 1960).

93. Vienna Convention on Diplomatic Relations arts. 26–27, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

94. See, e.g., United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 32 (May 24).

95. See, e.g., Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 166 (2003). The English Court of Appeal has made clear that the private party (the investor) is indeed the injured party: Occidental Exploration & Prod. Co. v. Republic of Ecuador, [2005] EWCA (Civ) 1116, [16] (Eng.).

A. Obligations Owed, Breaches Committed

Draft article 8 on Responsibility of International Organizations provides as follows:

EXISTENCE OF A BREACH OF AN INTERNATIONAL OBLIGATION

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.
2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.⁹⁶

As previously noted, the phrase “regardless of its origin and character” is significant, for it means that the articles apply to all substantive rules; the international law of responsibility is not limited to substantive rules originating in particular instruments or sources. Moreover, the established rules of the international organization include its constitutive instrument. Obligations arising under the U.N. Charter therefore are obligations a breach of which is a breach for purposes of responsibility. Acts that may constitute breaches include both actions and omissions.⁹⁷ It was, for example, omissions that concerned States at the time of the *logjam*, when they suggested that declining to admit a qualified State might constitute a breach of the Charter.⁹⁸

Where an obligation exists, the possibility exists of its breach. The concepts of obligation and breach are connected in this way. The draft articles, though they explicate the concept of breach in terms of its duration, continuing character, etc.,⁹⁹ do not say how to analyze evidence so as to determine whether it proves the existence of a breach. In actual disputes, of course, parties will contest evidence concerning an action or omission, so whether particular evidence leads to the determination that an act was “not in conformity with what is required . . . by [an] obligation” often will be a question requiring careful judgment.¹⁰⁰ Parties also

96. 2005 ILC Report, *supra* note 52, at 82.

97. *Id.* draft art. 11, at 83.

98. For a summary of the main statements to this effect, see Report of the Special Committee on Admission of New Members, U.N. GAOR 8th Sess., Annex 7, ¶ 8, U.N. Doc. A/2400 (June 25, 1953).

99. 2005 ILC Report, *supra* note 52, draft articles 8–11, at 82–83.

100. *E.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, ¶¶ 202–24 (Feb. 26) (considering the burden of proof, standard of proof, and methods of proof applicable to determining the facts); *id.*, ¶¶ 225–470 (examining the evidence in detail).

will contest the content of a putative obligation.¹⁰¹ But if the necessary facts are established and an obligation is specified, then identifying a given act as breaching the obligation (or not) is logically straightforward.

For purposes of the secondary responsibility to make reparation, however, the matter of breach will remain largely abstract if no injured party can be identified. A question therefore resides in the interstices of the rules concerning breach: one must ask against what party the breach has been committed. Entailed in the matter of breach is thus also the matter of obligation, for another way of asking against whom the breach has been committed is to ask to whom the obligation breached was owed. The Commentary to draft article 8 notes that “[a]n international obligation may be owed by an international organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.”¹⁰² With these terms in mind, one can consider the question against what entity or entities might a breach be committed respecting admission of States?

B. *The Injured Party*

1. The Newly Admitted State?

Many States at the time of their admission to the United Nations are well-established, and the mechanisms of public order within their jurisdiction operate fully and reliably. Others are new States. Some new States have rapidly consolidated their international status and also have established stable governments discharging the main tasks of internal order. Others have not. A number of new States have lacked governments with the capacity to maintain internal order and have been undermined by secessionist activity or other unrest. The Congo and Bosnia were salient examples.¹⁰³ If the creation of such States has resulted in injury and the practice of the United Nations in the matter of admission encouraged

101. For example, the United States and Mexico contested the meaning of “without delay” for purposes of Article 36(1)(b) of the Vienna Convention on Consular Relations: Counter-Memorial of the United States of America, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. Pleadings 78–104 (Nov. 3, 2003); Memorial of Mexico, *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. Pleadings 70–86 (June 20, 2003).

102. 2005 ILC Report, *supra* note 52, ¶ 206. Guiding Principle 6 applicable to unilateral declarations of States includes very similar terms: an obligation created by unilateral act may be owed to an international organization, a State or States, or the international community as a whole. 2006 ILC Report, *supra* note 46, at 370, 376.

103. For a summary of the accession to independence of the Congo and attendant political turbulence, see Arrest Warrant of 11 April 2000 (*Dem. Rep. Congo v. Belg.*), 2002 I.C.J. 3, 102–06 (Feb. 14) (separate opinion of Judge Bula-Bula). On Bosnia, see Application of Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 232 (Feb. 26).

their creation, then perhaps the admitted State is an injured party. As will be seen later in this Article, however, to make such a connection between admission, State creation, and injury may present a problem of causation.¹⁰⁴

Even if in principle it might be possible to establish responsibility of the United Nations or of the Member States toward the admitted State, this does not mean that in any actual case of admission responsibility necessarily would be established: no State has been admitted to the United Nations without asking to be.¹⁰⁵ Article 17, the first draft article under the heading Circumstances Precluding Wrongfulness, says as follows: "Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent."¹⁰⁶

The application of a State for admission to membership in the United Nations, duly adopted and duly presented, surely constitutes "[v]alid consent" on the part of the State applying. The formality associated with the U.N. admission procedure would seem all but to preclude evidentiary dispute.¹⁰⁷ The application not only constitutes consent; it is a step without which the act cannot be performed. As a "given act," admitting a State to the United Nations would be extremely hard to characterize as *not* "within the limits" of the request for admission. The United Nations admits; and the State is admitted. The act of admission consists in little more—even as its effects may consist in considerably more. The admitted State by the terms of draft article 17 would appear to have consented to admission. This would preclude admission as a wrongful act toward the admitted State.

104. See *infra* Part VI (discussing how proximate the act of admission might have to be to an injury for the act to constitute a breach for purposes of international responsibility).

105. The unusual case of the "reemergence" of Syria from the United Arab Republic is no exception. The legal characterization for the transactions in question is disputed, but Syria did not protest against its reintegration under separate title into the United Nations; and, though it made no formal application, Syria almost certainly asked before it was re-seated on October 13, 1961, even if it directed its request as a housekeeping matter to the administrative officers of the General Assembly and, perhaps, outside formal channels. On the Syrian matter, see Richard Young, Editorial Comment, *The State of Syria: Old or New?* 56 AM. J. INT'L L. 482, 483 (1962). Belorussia and Ukraine were original members and thus not "admitted" under Article 4. See Growth in the United Nations Membership, <http://www.un.org/members/growth.shtml#1940> (last visited July 7, 2009). Their membership is provided for under U.N. Charter art. 3.

106. 2006 ILC Report, *supra* note 46, ¶ 91, at 264.

107. Hypothetically, a case could arise of a government whose credentials to represent the State are doubted, and applies for U.N. membership in the name of that State; in practice, however, this case has not yet arisen.

This is a significant position, for it would preclude a category that might otherwise be the main category likely to invoke responsibility for admission.

2. Existing Member States of the Organization?

"It should not be controversial that an international organization incurs international responsibility for the breach of an obligation under international law that it may have towards its member States."¹⁰⁸ This assertion, however, must be qualified. Circumstances precluding wrongfulness may prevent responsibility from attaching for an otherwise wrongful act. And considerations of the constitutional character of the United Nations also come into play when considering the effect of the admission of a new member. Member States may be grouped in two categories when considering admission: those that voted in favor of admission and those that did not.

a. States Voting in Favor of Admission

Member States that voted in favor of admission, like the admitted State, consented to the act, so any wrongfulness that might be established, at least toward those Member States in their capacity as members, would be precluded on the same grounds.

b. States Not Voting in Favor of Admission

Member States that dissented or abstained perhaps present a distinct situation. The record of dissent to admission is thin, partly because the explanations for votes given in the Security Council and General Assembly seldom have been particularly detailed. In the few instances in which States have articulated why they would not vote for admission, a recurring objection has been that the applicant was not a State.¹⁰⁹ Dissentients also, if in considerably fewer cases, have said that the admitted State did not comply with Charter obligations, such as commitments to human rights.¹¹⁰ Yet dissent against a decision reached by the United Nations' constitutional mechanisms does not result in the dissentients having a different set of legal relations to the United Nations from members of the

108. ILC, *Fifth Report on Responsibility of International Organizations*, ¶ 10, U.N. Doc. A/CN.4/583 (May 2, 2007) (prepared by Giorgio Gaja) [hereinafter *Fifth Report of Special Rapporteur Gaja*].

109. Two such cases were Kuwait and Mauritania. See U.N. SCOR 16th Sess., 984th mtg. at 5, U.N. Doc. S/PV.984 (Nov. 30, 1961) (remarks of Mr. Pachachi of Iraq regarding Kuwait); U.N. SCOR, 15th Sess., 911th mtg. ¶ 194, U.N. Doc. S/PV.911 (Dec. 3, 1960) (remarks of Mr. Boucetta of Morocco regarding Mauritania).

110. See U.N. SCOR, 31st Sess., 1972nd mtg. at 13–14, U.N. Doc. S/PV.1971 (Nov. 15, 1976) (remarks by Mr. Scranton of the United States respecting Vietnam).

majority. To amend the Charter, to note the main example, is to amend it for all members. Admission of a State to the United Nations is similar in its general effect on the membership. Admission is a constitutive act in the sense that it alters the make-up of the Organization. To be sure, admission does not bind Member States to recognize the admitted State or to adopt any other particular diplomatic posture toward it; but existing Member States have no right to deny that the newly admitted State is a member. The occasional statement by certain States for example, that they do not accept Israel as a U.N. Member State, is clearly without Charter basis.

3. The International Community as a Whole

Comment (3) to draft article 8 also lists as an entity to which an international obligation may be owed (and thus against which a breach committed) “the international community as a whole.”¹¹¹ The proposition is by now well-established that *erga omnes* obligations exist in international law—that is to say, obligations owed not to one party alone but to the community subject to the legal system. Though the idea is older,¹¹² its modern appearance is associated with the following well-known statement of the ICJ in *Barcelona Traction*:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding

111. 2005 ILC Report, *supra* note 52, ¶ 206, at 87.

112. For example, the Concert of Europe acted as if it held certain rights and obligations concerning general public order. See CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (2d rev. ed. 2005). The Concert was not an international organization (though it may have been a progenitor of international organizations. See *id.* Its legal interest in adopting a settlement in 1815 (and in maintaining the settlement adopted) probably did not include an articulated interest in collective security, but that interest may otherwise be likened to the interest which gives “the international community as a whole” rights and obligations with respect to certain aspects of public order today. See STEPHAN VEROSTA, KOLLEKTIVAKTION DER MÄCHTE DES EUROPÄISCHEN KONZERTS (1886–1914) (1988).

rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.¹¹³

Barcelona Traction concerned investment protection and, as such, the Court's disquisition on obligations "towards the international community as a whole" was for purposes of contrast, indeed obiter dictum.¹¹⁴ It is nevertheless a significant statement about legal rights in the international system.

a. The Scope and Content of *Erga Omnes* Obligations

Two questions of the scope and content of *erga omnes* obligations are relevant to the question of whether an obligation concerning admission of States may be owed to the international community as a whole. First, though *erga omnes* obligations plainly involve such matters as genocide and slavery, are there *erga omnes* obligations involving matters of lesser magnitude? And second, though there are *erga omnes* obligations where the injured party is a particular State or other person and, by construction, the international community as a whole is said to be injured, is it possible for the international community as a whole to be directly injured?

The obligation to observe certain, at least basic, human rights has an *erga omnes* character: "[T]he importance of the rights" discussed in *Barcelona Traction* is such that "all States can be held to have a legal interest in their protection" and, it is said to follow,¹¹⁵ the special character of the rights results in the jurisdiction of the State, which is otherwise exclusive, being qualified. While *erga omnes* obligations include "obligations generally aim[ed] at regulating the internal behavior of a state, such as in the field of human rights,"¹¹⁶ they certainly include more. For example, the ICJ in the passage in *Barcelona Traction* concerning *erga omnes* obligations includes among them the prohibition against aggression. The Court later would add to this the

113. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

114. See, e.g., M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HARV. L. REV. 203, 239 (2006); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 318 (2006) (referring to it as dicta).

115. E.g., Rosanne van Alebeek, *The Pinochet Case: International Human Rights Law on Trial*, 2000 BRIT. Y.B. INT'L L. 29, 34.

116. Shelton, *supra* note 114, at 318.

obligation to respect the self-determination of peoples.¹¹⁷ While deprivation of self-determination and conduct of aggressive war have serious consequences within the borders of a given State, these breaches of obligation also concern international society at large. Maintenance of general public order would seem to have a certain “importance,” and at least as clearly as human rights, is a material interest of all States. That States created the United Nations as an institution to guarantee general public order, and made that function primary among its tasks, suggests the intention to establish a corresponding legal interest.

The fourth preambular paragraph of the Statute of the International Criminal Court (Rome Statute)¹¹⁸ refers to the need to punish the “most serious crimes of concern to the international community as a whole.” Article 5, which sets out the crimes over which the Court has jurisdiction, refers to those crimes in the same terms.¹¹⁹ The four crimes which Article 5, paragraph 1 lists as the “most serious crimes of concern to the international community as a whole” are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. These are crimes resulting from a breach of peremptory norms. Considering the terms of the Rome Statute and the guidance of the Court, one might ask whether *erga omnes* obligations are only those of such magnitude. It is true that clear cases of obligations owed to all are obligations to respect certain imprescriptible rules of international law. The notions of “universal crimes” and “universal jurisdiction” contain a similar relation.¹²⁰ The International Criminal Tribunal for the Former Yugoslavia (ICTY) has identified crimes that “*must* be prosecuted and punished by all States” as “grave breaches” of the Geneva Conventions.¹²¹

Yet certain rules that are subject to the will of States Parties—i.e., rules that are capable of reformulation or derogation—have *erga omnes* effect as well. That *erga omnes* obligations and *jus cogens* rules are not identical has been noted, for example by Alexander Orakhelashvili:

117. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9); East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30).

118. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002 [hereinafter ICC Rome Statute].

119. *Id.* at 1003–04 (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. . .”).

120. See, e.g., Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT’L L. 60, 71 (1952); Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 48–51 (1947); Quincy Wright, *War Criminals*, 39 AM. J. INT’L L. 257, 280–83 (1945). For critical observations on universal jurisdiction, see Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 43 (Feb. 14) (separate opinion of President Guillaume); see also *id.* at 78 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

121. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 308 (Nov. 16, 1998) (emphasis in original).

It appears that *jus cogens* and obligations *erga omnes* are but two sides of the same coin, as they both relate to the concern of all States. Arguably, while obligations *erga omnes* follow from peremptory norms, the reverse is not always true. There can be *erga omnes* obligations not deriving from *jus cogens*, such as the right of passage in an international strait.¹²²

Another example is the definition of international land and maritime frontiers: international law does not preclude a change in frontier (so long as the change takes place on the basis of consent), and the effects of a change lawfully instituted are opposable against all.¹²³ It nevertheless is clear that a consensual change to an international boundary is not the same as targeted killings of an ethnic group.

The second question is whether a breach, in order to be a breach to which the international community as a whole has a right to respond, necessarily entails conduct directed against individuals or States. The main cases of breaches that concern the international community as a whole are cases of breaches committed against a State or an individual. For example, a State is attacked or an individual is enslaved. The community's interest is a legal construction, for the party directly injured is only a constituent of the community, not the community itself. The question is whether a breach can "concern the international community as a whole" in the more direct sense that the main (or only) identifiable victim of the breach is the community itself. It is not clearly an *a fortiori* case that, if the community can proceed in response to a breach consisting of conduct which directly injures individuals or States, it can proceed in response to a breach where the community is the only or the primary victim. For one thing, the breach that directly affects individuals or States is more likely to instigate institutional responses than the breach that lacks a clear target; the international community as a whole does not act except through institutions.¹²⁴ For another, the international community's institutions, when they do act, may well act as agents to which States have delegated authority in response to an attack on the States' particular interests. It does not necessarily follow that the institutions

122. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 268–69 (2006).

123. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2001 I.C.J. 652, 655 (Oct. 23) (separate opinion of Judge Franck) (application by the Philippines for permission to intervene).

124. See the observation of the Commission of the European Union in connection with the ILC draft articles: "[T]he international community as a whole cannot act on its own lacking centralized institutions..." ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, at 11, U.N. Doc. A/CN.4/593 (Mar. 31, 2008).

have authority to act without the delegation. Gaja notes in the Sixth Report that the entitlement of an international organization to invoke responsibility for a breach of an obligation to the international community “would not necessarily depend on the fact that the international organization is a member of the international community. It could be seen as delegated by the States that are members of the organization.”¹²⁵

If, for the international community to act, the breach must in the first instance affect a State or individual, however, then a gap exists in the regime. Certain breaches usually considered breaches of *erga omnes* obligations—for example, breaches of the right to self-determination—are not only, or even mainly, matters of individual rights or the rights of States. Obligations concerning protection of the natural environment perhaps furnish another example of obligations, the breach of which is not against individuals or States, but against the community as a whole¹²⁶ (though on the whole environmental damage still is treated as a matter between States).¹²⁷ An obligation to protect world cultural heritage is also a possible example of a situation in which the individual or State interest is secondary to that of the community.¹²⁸ Whether the community is acting in response to a breach directly affecting itself or, instead, affecting particular constituents, a problem in both cases will be to identify a mechanism that can act on behalf of the community. The United Nations is the obvious mechanism, and so the relation between the United Nations and the community merits some consideration.

b. The Relation Between the United Nations and the International Community as a Whole

Karel Wellens says that “global civil society is the natural constituency to which [international organizations] are accountable.”¹²⁹ If Wellens is right, then it would be surprising, even illogical, if international organizations could not owe that society obligations. The Draft Articles on Responsibility of International Organizations assume that an

125. ILC, *Sixth Report on Responsibility of International Organizations*, ¶ 37, U.N. Doc. A/CN.4/597 (Apr. 1, 2008) (prepared by Giorgio Gaja) [hereinafter *Sixth Report of Special Rapporteur Gaja*].

126. For environmental protection being a possible *erga omnes* obligation, see Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 88 (Sept. 25) (separate opinion of Judge Weeramantry). See also the arbitral cases noted by CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *Erga Omnes* in INTERNATIONAL LAW 9 n.34 (2005). For a discussion about respecting the relation between environmental interests and *erga omnes* obligations, see XUE HANQIN, TRANSBOUNDARY DAMAGE in INTERNATIONAL LAW 237–50 (2003).

127. E.g., 2001 ILC Report, *supra* note 7, at 370–77.

128. ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT (2006).

129. Karel Wellens, *Accountability of International Organizations: Some Salient Features*, 97 AM. SOC’Y INT’L L. PROC. 241, 245 (2003).

international organization can indeed owe obligations to society, or at least to “the international community as a whole.” Draft article 51, for example (“[i]nvocation of responsibility by an entity other than an injured State or international organization”), under paragraph 2, provides that “[a]ny State other than an injured State is entitled to invoke the responsibility of an international organization . . . if the obligation breached is owed to the international community as a whole.”¹³⁰ Draft article 22, paragraph 1(a), by way of exception, permits an organization to invoke necessity as a ground precluding wrongfulness, where the otherwise wrongful act “[i]s the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest.”¹³¹ As noted, the United Nations clearly has the function to protect “that interest.”¹³²

As an organization that now includes nearly all States, the United Nations also has structural characteristics that place it in special relation to the international community. What, however, precisely is that relation? If the position were taken that the United Nations is identical to the community, then the conceptual problem arises of an entity owing itself a legal obligation; such a conception would be rather strained, if not illogical. The problem is avoided by recognizing, as the ILC at least implicitly did, that the United Nations and the community are distinct formations. Several considerations distinguish them.

First, the international community preceded the United Nations. Though States and other international actors were not necessarily thought of as constituting a “community” before the latter half of the twentieth century,¹³³ the United Nations did not make its appearance against a backdrop of complete normative chaos. The international system may have been significantly underdeveloped, but it was not non-existent. A second, and related distinction, is that the international community, even as it has become more developed over recent decades,

130. *Sixth Report of Special Rapporteur Gaja*, *supra* note 125, ¶ 40.

131. *2006 ILC Report*, *supra* note 46, ¶ 91, at 272 (emphasis added); *see also id.* at 274 (comment (4) to draft article 22).

132. *Behrami v. France*, App. No. 71412/01, & *Saramati v. France*, App. No. 78166/01, 45 Eur. H.R. Rep. SE10, ¶¶ 20, 148 (2007). Writers, too, have considered obligations of the United Nations to the international community. *See, e.g.,* Iain Scobbie, *Unchart(er)ed Waters? Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine*, 16 EUR. J. INT'L L. 941, 959–61 (2005).

133. The nineteenth century tendency was to describe a society of European States, existing under certain rules *inter se*, but in distinction against other States and polities. EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM, AND ORDER IN WORLD POLITICS* 114 (2002).

lacks institutional form. The United Nations by contrast is an institution and, arguably, the principal organized expression of the international community.¹³⁴ But it remains a limited expression, which suggests a third distinction: the United Nations is an organization of States. It has come to be an organization of nearly all States—but not necessarily all. According to the ICJ in the *Namibia* Advisory Opinion,

[a]s to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon . . . to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law. . . .¹³⁵

Erga omnes rules are opposable to all States, non-member States and Member States alike. The United Nations and the community of States, though overlapping considerably, are not necessarily coterminous.

And even if the United Nations comprised all States and continued to do so by way of a constitutional guarantee, the United Nations still would not be the same as the international community as a whole, for the community encompasses considerably more than States. Individuals insofar as they possess aspects of international legal personality are part of the community.¹³⁶ International organizations, though many of them are involved directly or indirectly in the U.N. system,¹³⁷ are not all part of the United Nations—but they certainly are part of the international community. Entities proximate to States and the various non-State corporate formations, such as religions, transnational interest groups, non-governmental organizations, and the like, too, at least for certain purposes are constituents of the international community. The extensive involvement of non-governmental organizations in drafting

134. Judge Bustamante y Rivero called the League of Nations "the first organized expression of the international community." *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1962 I.C.J. 319, 351 (Dec. 21) (separate opinion of Judge Bustamante). Writers have applied the phrase to the United Nations. *See, e.g.*, Toufayan, *supra* note 16, at 248–49.

135. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Port. v. Austl.), Advisory Opinion, 1971 I.C.J. 16, 56 (June 21).

136. *See, e.g.*, LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27).

137. And some simultaneously are part of the U.N. system and another regional system—*e.g.*, the Pan American Health Organization. 2004 *Comments*, *supra* note 31, at 27–28 (comments by the WHO).

recent multilateral conventions illustrates their relevance as community members.¹³⁸

As such, the United Nations itself is not the international community, but it may well be the most nearly perfect expression of that community in institutional form (however imperfect it may remain). Universality, as a principle embedded in post-1945 practice, has resulted in nearly full participation by States, and States are still the most significant actors in the international community. Even if full universality of state membership in the United Nations were achieved and maintained, and even if States were the *sole actors*, rather than merely the main actors, the United Nations would remain an institutional mechanism for purposes of giving expression to the international community; it still would not be the same thing as the community itself. In the Draft Code of Crimes against the Peace and Security of Mankind (1996), the ILC said that attacks against U.N. personnel “constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community.”¹³⁹ The United Nations was not equated with the international community: U.N. personnel are “persons who *represent* the international community.”¹⁴⁰ A duty to the “international community as a whole” very much may involve the United Nations, for the United Nations is specially suited as an institution to represent the community’s interests. It follows from its distinctness from the community and from its assigned functions that the United Nations itself may owe obligations to the community.

IV. ATTRIBUTION AND ACCOUNTABILITY

As noted in Part I above, international responsibility arises where the law attributes a breach of an obligation to a particular party. Even where responsibility arises, however, there remains the matter of holding the responsible party accountable. The mechanisms for doing so at the international level are not highly developed in all fields. Both the ILC and writers have acknowledged the underdevelopment of mechanisms of accountability as an obstacle to implementing a system of responsibility of international organizations.¹⁴¹ The present section considers attribution

138. For example, non-governmental organization participation was particularly extensive in the negotiations leading to adoption of the Convention on the Rights of Persons with Disabilities.

139. ILC, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, ¶ 50, U.N. Doc. A/51/10 (Jan. 1, 1996).

140. *Id.* (emphasis added).

141. See, e.g., Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing*

and accountability relative to the question of responsibility for admission of States.

ARSIWA Article 57 reserves the thorny issue of attribution of the conduct of an international organization to its Member States. The saving clause therein indicates that the Articles are “without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.” The first reservation, excluding international organizations, has a clear place in ARSIWA: the Articles are articles of *state* responsibility. The second reservation, however, raises a question. If ARSIWA addresses state responsibility, why should it not address state responsibility in the framework of an international organization? ARSIWA implicitly admits the difficulty of the relation of the responsibility of the organization to that of its members. The ILC noted the difficulty in its Commentary.¹⁴²

It is well-established that international organizations are not above the law. At the very least, the internal law of an organization limits its conduct. According to the Appeals Chamber of the ICTY, “[t]he Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations”¹⁴³ International law governs the conduct of the organization as well. Indeed, by the commonly received definitions, an international organization is an entity created under international law and subject to its terms. G. G. Fitzmaurice, for example, acknowledged the international law basis of international organizations in the definition he proposed, and which El-Erian later accepted as “gather[ing] all the essential elements.” According to Fitzmaurice, “[t]he term ‘international organization’ means a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that

the Gap, 25 MICH. J. INT’L L. 1159, 1161 (2004) (noting the ILC’s initial work on the accountability problem); *see also* Gerhard Hafner, *Accountability of International Organizations*, 97 AM. SOC’Y INT’L L. PROC. 236, 236–40 (2003) (defining “accountability” and comparing it to responsibility); William E. Holder, *International Organizations: Accountability and Responsibility*, 97 AM. SOC’Y INT’L L. PROC. 231, 233 (2003) (noting internal compliance mechanisms but limited external accountability of the World Bank and IMF).

142. THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 105 (James Crawford ed., 2002) [hereinafter ILC COMMENTARIES].

143. Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 42 (1996).

of its member-States, and being a subject of international law with treaty-making capacity.”¹⁴⁴

Therefore the problem is not one of general applicability of international law to the international organization. Practice supports that an international organization holds obligations under international law. The *Reparation for Injuries* Advisory Opinion, issued approximately a century after the first appearance of international organizations in the modern sense, said that an international organization may possess legal personality and oppose rights against a State.¹⁴⁵ It took another fifty years for a definitive statement that an international organization may hold obligations, such that it “may be required to bear responsibility for the damage arising from [its] acts.”¹⁴⁶ As a general matter, modern writers do not view the legal personality of international organizations or their subjection to international law as controversial.¹⁴⁷ Problems begin to emerge when, from the general proposition that international law applies to an international organization, one attempts to draw specific conclusions.

*A. The Organization or its Member States: The Problem of Attribution*¹⁴⁸

The ICJ was clear in its merits judgment in the *Bosnian Genocide case* that a “duality of responsibility” exists, such that the responsibility of one international actor does not in itself preclude the responsibility of another.¹⁴⁹ The Court was concerned principally there with the relation

144. ILC, *Report of the International Law Commission on the Law of Treaties*, U.N. Doc. A/CN.4/100 (1956) (prepared by G.G. Fitzmaurice), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 108, U.N. Doc. A/3159.

145. *Reparation for Injuries Suffered in Service of United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11); see also *First Report of Special Rapporteur Gaja*, *supra* note 11, ¶¶ 16–20, at 9–12. For writers on the legal personality of international organizations, see JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 129–39 nn.63–101 (2005).

146. *Difference Relating to Immunity from Legal Process of Special Rapporteur of Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 62, 88–89 (Apr. 29). As late as the 1980s, publicists still had expressed doubt on the point. See, e.g., *Summary Records of the Meetings of the 2024th Meeting*, [1987] 1 Y.B. Int'l L. Comm'n 194–95, U.N. Doc. A/CN.4/SER.A/1987; cf. ILC, *Responsibility of International Organizations: Comments and Observations Received from Governments and International Organizations*, 28–29, U.N. Doc. A/CN.4/556 (May 12, 2005) [hereinafter *2005 Comments*] (comment of the Democratic Republic of the Congo); *2007 Comments*, *supra* note 31, at 14 (comment of the European Commission).

147. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 648–50 (7th ed. 2003).

148. On the relation generally between attribution of conduct to an international organization and attribution of conduct to a State, see ILC, *Second Report on Responsibility of International Organizations*, ¶¶ 5–13, U.N. Doc. A/CN.4/541 (Apr. 1, 2004) (prepared by Giorgio Gaja) [hereinafter *Second Report of Special Rapporteur Gaja*].

149. *Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 91, ¶ 173 (Feb. 26).

between individuals and States, but duality, or “plurality” to use the word in the relevant ILC articles,¹⁵⁰ pertains to the relation between international organizations and their constituent States as well.¹⁵¹ As a general matter, then, responsibility can attach to both the international organization and its constituent States. In a given case, however, responsibility does not necessarily attach to both, and how, if at all, it attaches to the constituent States must be referred to the relevant rules of international responsibility.

Central to the rules of international responsibility of international organizations is the capacity of organizations to hold rights and obligations. As noted above, the international organization, as an international legal person, holds rights and obligations, and it does so independently of the States that constitute it. Yet the independence of the international organization is relative; the responsibility of an international organization, at least on some general level, is related to that of Member States. This began to be seen early in the history of the modern development of a law of international organizations. Liberia, for example, in the *IMCO* proceedings, said that,

the legality of the conduct not only of international institutions but also of the Members themselves in relation to the activities of such institutions is governed as well by general rules of international constitutional law as by the express terms of the constituent instrument of the organization.¹⁵²

The task for recent codifiers has been to develop rules that express the relation in specific terms rather than merely acknowledge its existence.

At least two reasons of practical policy exist for imputing the conduct of an international organization to its Member States. First, it may be that the organization is not subject to any process that affords an injured party a chance to seek reparation. The main observation in this connection is that the United Nations and other international organizations are not subject to proceedings in the ICJ.¹⁵³ Second, even if the organization is subject to process, its suitors may discover that it is an

150. See *Sixth Report of Special Rapporteur Gaja*, *supra* note 124, draft art. 47. According to the Special Rapporteur, “[w]hen an international organization is responsible for an internationally wrongful act, another entity may also be responsible for the same act.” *Id.* ¶ 24, at 9.

151. See *id.* ¶ 1, draft art. 50.

152. Written Statement of the Government of Liberia, Constitution of Maritime Safety Committee of Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. Pleadings 71 (Nov. 19, 1959).

153. James Crawford & Tom Grant, *International Court of Justice*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS* 193, 204–06 (Thomas G. Weiss & Sam Daws eds., 2007).

empty shell. This was the problem in the *Tin Council Case*.¹⁵⁴ The creditors of the Sixth International Tin Council (which had collapsed during a tin glut) were able to sue the Council in English court.¹⁵⁵ However, the Council was insolvent and thus, practically judgment proof.¹⁵⁶ The creditors sought judgment against the States which had constituted the Council, but English courts “possess[ed] neither the evidence nor the authority to pronounce judgment” on the Member States.¹⁵⁷ This was the functional equivalent of the corporate shield—but with no provision for veil piercing.¹⁵⁸

States acting in cooperation (or collusion as the case may be) do not always do so in the framework of an international organization. The Administering Authority, a body created by Australia, New Zealand, and the United Kingdom for purposes of phosphate mining in Nauru, was not an international legal person.¹⁵⁹ There was thus no problem in attributing to the three States acts associated with the mining industry in Nauru (which devastated the local environment), and the ICJ was a forum in which proceedings could be instituted.¹⁶⁰ It also may be that a “coalition of the willing,” if its actions cannot be proven to have taken place under the mandate of an international organization, is really a consortium of its participants, each State retaining responsibility for any breach the coalition might be shown to have committed. Thus the U.K. House of Lords in *Al-Jedda* said:

The UN did not dispatch the coalition forces to Iraq. The [Coalition Provisional Authority] was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US. Following UNSCR 1483 in May 2003 the role of the UN was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by UNSCR 1511 in October 2003. By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but . . . the Security Council was not delegating its power

154. *Maclaine Watson & Co. v. Int'l Tin Council*, [1989] 3 All E.R. 418.

155. *Id.*

156. *Id.* at 419.

157. *Id.* at 482.

158. See Steinkraus-Cohen Lecture, *supra* note 30, ¶ 8, at 4; see also MALCOM N. SHAW, *INTERNATIONAL LAW* 1201–04 (5th ed. 2003).

159. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240, 258 (June 26).

160. *Id.* at 258–62; see Steinkraus-Cohen Lecture, *supra* note 30, at 2–3.

by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.¹⁶¹

The Coalition was certainly not an international organization in its own right; and the States comprising it, notwithstanding later Security Council practice, were not acting under U.N. cover for purposes of responsibility.

The modern creation of so many new international organizations—and real organizations, not mere consortia—means, however, greater opportunities for shielding collective action behind a separate corporate legal personality. This presents the risk that States will resort to the organizations they constitute as a comprehensive means to avoid responsibility for what, in truth, are their own initiatives. One source of a solution, perhaps, is the judiciary. The ECtHR, like the House of Lords, in certain cases has prevented States from escaping responsibility through their membership in international organizations. For example, in *Waite & Kennedy v. Germany* the ECtHR said that it would be “incompatible with the purpose and object of the [Convention for the Protection of Human Rights and Fundamental Freedoms (1950)] . . . if the Contracting States were . . . absolved from their responsibility under the Convention” by their agreement to vest certain competences and accord certain immunities to the European Space Agency.¹⁶² The Agency can carry out functions for which States created it, but those functions cannot include serving as a black hole of international responsibility. (The House of Lords in *Al-Jedda* referred to the relevant passage of *Waite & Kennedy*).¹⁶³ The ECtHR followed *Waite & Kennedy* with *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, asserting that “absolving Contracting States completely from their Convention responsibility in the areas covered by . . . a transfer [of sovereignty to an international organization] would be incompatible with the purpose and object of the Convention.”¹⁶⁴ These cases are only a start and, in any

161. R (on the application of *Al-Jedda*) v. Sec’y of State for Defence [2007] UKHL 58, ¶¶ 23–24 (appeal taken from Eng.) (U.K.); see also Steinkraus-Cohen Lecture, *supra* note 30, ¶ 4, at 2.

162. *Waite & Kennedy v. Germany*, 30 Eur. Ct. H.R. 261, 287 (1999).

163. *Al-Jedda*, [2007] UKHL 58, ¶ 37.

164. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, App. No. 45036/98, 42 Eur. H.R. Rep. 1, 44 (2005). On the *Bosphorus* case, see Cathryn Costello, *The*

event, they arose within the European human rights framework, which, at least one State has suggested, may limit their wider relevance to the allocation of responsibility between Member States and international organizations.¹⁶⁵

Invoking obligations under the European Convention, however, is not guaranteed to attach responsibility to the Member State. The *Behrami and Behrami case* and the *Saramati case* (which the ECtHR joined when considering admissibility) both arose out of events in Kosovo—respectively, a munitions accident and an arrest and detention. According to the Court,

the circumstances of the present cases are essentially different from those with which the Court was concerned in the *Bosphorus* case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of [the Kosovo Force (KFOR)] and [the U.N. Mission in Kosovo (UNMIK)] cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the [U.N. Security Council]. As such, their actions were directly attributable to the UN, an organisation of

Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe, 6 HUM. RTS. L. REV. 87 (2006).

165. 2005 Comments, *supra* note 146, at 55–59 (comments of Germany).

universal jurisdiction fulfilling its imperative collective security objective.¹⁶⁶

In short, personnel from the Member States were deployed as part of UNMIK and KFOR, which were not State organs, but U.N. organs. The United Nations held responsibility for the acts involved; the Member States did not. In the *Berić* and *Kalinić and Bilbija* cases, where the challenges concerned dismissal of government officials in Bosnia and Herzegovina, the ECtHR again attributed conduct to the United Nations, not to the Member State.¹⁶⁷ (Here, the conduct sought to be impugned was that of the High Representative, to whom the Security Council assigns far-reaching authority in Bosnia and Herzegovina).¹⁶⁸ From the judicial decisions at any rate, which attracted considerable criticism,¹⁶⁹ it is therefore certainly too soon to say that a body of consistent practice exists generally favorable to attaching responsibility to the Member States.

Though the House of Lords in *Al Jedda* determined that the relation of Multinational Forces in Iraq to the Security Council was not to be equated to that of UNMIK and KFOR in Kosovo, the determination was tightly bound to the operational facts of the Iraq deployment.¹⁷⁰ *Al Jedda* in itself hardly suggests that courts will be quick in general to strip States of the shielding that comes from attributing conduct to the organizations they constitute, even as the judiciary may push back against non-accountability in particular cases. Erika de Wet is correct to note “the hesitance of regional and domestic courts in exercising judicial review in instances where normative measures stemming from a powerful interna-

166. *Behrami v. France*, App. No. 71412/01, & *Saramati v. France*, App. No. 78166/01, 45 Eur. H.R. Rep. SE10, ¶ 151 (2007).

167. *Berić v. Bosnia & Herzegovina*, App. No. 36357/04, 46 Eur. H.R. Rep. SE6, 91 (2008); *Kalinić & Bilbija v. Bosnia & Herzegovina*, App. No. 45541/04, Eur. Ct. H.R. (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kalinić&sessionid=26551559&skin=hudoc-en> (last visited July 11, 2009).

168. S.C. Res. 1031, ¶¶ 26–27, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

169. See, e.g., Thomas Giegerich, *The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?*, 10 GERMAN L.J. 31, 55–57 (2009); Kjetil Mujezinović Larsen, *Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test*, 19 EUR. J. INT'L L. 509, 512–25 (2008); Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUM. RTS. L. REV. 151, 158–59 (2008); Guglielmo Verdirame, *Breaches of the European Convention on Human Rights Resulting from the Conduct of International Organisations*, 2008 EUR. HUM. RTS. L. REV. 209, 212–13 (2008); K. William Watson, *Berhami v. France: Constructive Blue Helmets Protect KFOR Nations from Accountability*, 16 TUL. J. INT'L & COMP. L. 575, 589 (2008).

170. *R. (on the application of Al-Jedda) v. Sec'y of State for Defence* [2007] UKHL 58, ¶¶ 8–25 (appeal taken from Eng.) (U.K.).

tional institution directly conflict with human rights obligations.”¹⁷¹ At least when the Security Council adopts a mandate under Chapter VII, a party seeking to assert responsibility against the State deploying personnel under the mandate may face considerable difficulty.

States, for their part, remain clear as to the separateness of State responsibility and international organization responsibility. “The overall trend in German State practice,” for example, “is to deny State responsibility for the actions of international organizations.”¹⁷² Poland suggested that a “progressive development of international law” should elucidate “the scope of responsibility of the Member State for acts of the organization” and added that “the current international practice does not indicate the existence of any rules of general (customary) international law showing a clear solution of the question posed.”¹⁷³ Italy refers to cases in which the Court of Cassation “held that the organs of an international organization . . . are to be distinguished for legal purposes from the organs of Member States.”¹⁷⁴ Denmark, Estonia, Greece, the United Kingdom, and Portugal adopted consistent positions in submissions to the ECtHR in the *Behrami* and *Saramati* cases.¹⁷⁵ Leading publicists take a similar position. The Institut de Droit International in Article 6(a) of its 1995 resolution said, “[s]ave as [otherwise] specified . . . there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members.”¹⁷⁶ And the ILC, in its commentary to draft article 29 on the Responsibility of International Organizations says that it is “clear that . . . membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.”¹⁷⁷

The insulation that the Member States enjoy against the international organization’s own wrongful acts has left it for claimants to characterize such acts as not in truth belonging to the international organization. This

171. Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, 9 GERMAN L.J. 1987, 2010 (2008).

172. 2005 Comments, *supra* note 146, at 65.

173. ILC, *Responsibility of International Organizations: Comments and Observations Received from Governments*, at 9, U.N. Doc. A/CN.4/547 (Aug. 6, 2004).

174. *Id.* at 13 nn.9–10.

175. *Behrami v. France*, App. No. 71412/01, & *Saramati v. France*, App. No. 78166/01, 45 Eur. H.R. Rep. SE10, ¶¶ 97–117 (2007).

176. Institut de Droit International, *The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of Their Obligations Toward Third Parties*, 66-II ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 445 (1996). For a discussion of the exceptions, including acquiescence or an abuse of rights, reliance, and agency, see SHAW, *supra* note 158, at 1201–04.

177. 2006 ILC Report, *supra* note 46, at 287.

has led to the development of a small, but apparently growing, jurisprudence around draft article 5 of the Draft Articles on Responsibility of International Organizations. Draft article 5 provides that “[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.” The House of Lords said that the requisite control for establishing the responsibility of the international organization is quite strict. According to the House of Lords, the relevant questions to ask when determining whether that degree of control exists are as follows:

Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? . . . Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq?¹⁷⁸

The ECtHR, by contrast, implied that draft article 5 is relatively lenient in the standard it sets for determining whether the international organization controls the organ or personnel in question. According to the ECtHR, it is enough that the international organ “retained ultimate authority and control so that operational command only was delegated.”¹⁷⁹ In other words, the State personnel or organs could continue to be under the “operational control” of the State yet, for purposes of draft article 5, the international organization would hold international responsibility for their conduct.

Writers have criticized the “ultimate control” test as misconstruing draft article 5.¹⁸⁰ They would call on courts to follow the House of Lords approach in *Al-Jedda* and make clear that only truly “effective control” suffices, if a State is to avoid responsibility, and the definition of “effective control” is such as to leave very little, if any, control, operational or otherwise, in the hands of the State. Such a judicial approach however

178. R. (on the application of *Al-Jedda*) v. Sec’y of State for Defence [2007] UKHL 58, [22] (appeal taken from Eng.) (U.K.).

179. *Behrami v. France*, App. No. 71412/01, & *Saramati v. France*, App. No. 78166/01, 45 Eur. H.R. Rep. SE10, ¶ 133 (2007).

180. E.g., Pierre Bodeau-Livinec et al., *Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway*, 102 AM. J. INT’L L. 323, 328 (2008); Larsen, *supra* note 169, at 514–25; Alexander Orakhelashvili, *R (on the Application of Al-Jedda) (FC) v. Secretary of State for Defence*, 102 AM. J. INT’L L. 337, 342–3 (2008); Sari, *supra* note 169, at 164. Cassese, by contrast, suggests that it will be difficult in practice to prove what degree of control existed and, thus, that a test of “global control” is the most precise that courts practically can implement. Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649, 657 (2007). This implicitly approves the European Court’s approach.

does not address the larger problem. The larger problem, it is submitted, is that the international organization, once its responsibility is established, largely keeps responsibility to itself. As noted, with responsibility held by the organization, there is little prospect of a legal process vindicating the rights of an injured party, for the organization avoids the effective mechanisms of accountability that claimants might employ. Responsibility so limited is responsibility with little or no practical consequence. Yet to attack the problem by seeking to close up the interpretation of draft article 5 is an incomplete strategy, for cases will still exist in which “effective control” has been duly transferred from State to organization. If only in the interest of preserving the meaning and effectiveness of draft article 5, there must remain *some* situation in which the international organization exercises effective control over the State resources committed to its command. Thus, however much courts may tighten the definition of draft article 5, States may craft the terms of their relations to the international organization so as to fall within the definition. The benefits to States of handing over “effective control” to the organization are much too great for States in all cases to be jealous about who commands their forces. The exchange—control given for freedom from responsibility gained—is likely to continue, and, as the rules of attribution now stand, in turn, to perpetuate the *Behrami* problem.

As a matter of general principle, it need not be that vesting responsibility in the organization inevitably results in the State avoiding responsibility. Responsibility may be held by both. The ILC acknowledges this possibility in the draft articles. Draft article 50, paragraph 1 would provide as follows:

Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each responsible entity may be invoked in relation to that act. However, if the responsibility of an entity is only subsidiary, it may be invoked only to the extent that the invocation of the primary responsibility has not led to reparation.¹⁸¹

It is most unlikely that the international organization will be compelled to make reparation, so the condition (that invocation of the primary responsibility “has not led to reparation”) in the typical case is most likely

181. *Sixth Report of Special Rapporteur Gaja, supra* note 125, ¶ 27, at 10; *see also* Sari, *supra* note 169, at 159 (“The attributability of the relevant acts and omissions to the UN merely demonstrates that the UN could in principle incur responsibility for the internationally wrongful conduct of KFOR and UNMIK, but this [does not exclude] the possibility that the same conduct may also be attributable to the respondent States . . .”).

to have been met. Though the subsidiary responsibility of the State is established only by way of exception to a general rule, such responsibility, it is submitted, is the more promising mechanism for reaching States for conduct that they otherwise all too easily may shield behind organizational cover. The ILC, apparently in an exercise of its function of progressive development,¹⁸² indeed attempts in this way to tackle the problem of the international organization shielding its Member States. The draft articles incorporate a chapter respecting "Responsibility of a State in Connection with the Act of an International Organization."¹⁸³ Draft articles 25 through 30 are as follows:

Article 25

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 26

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 27

182. Statute of the International Law Commission, G.A. Res. 174 (II), art. 1(1), U.N. Doc. (Nov. 21, 1947).

183. 2006 ILC Report, *supra* note 46, at 261–63.

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of that international organization;
- (b) That State does so with knowledge of the circumstances of the act.

Article 28

International responsibility in case of provision of competence to an international organization

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.
2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 29

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:
 - (a) It has accepted responsibility for that act; or
 - (b) It has led the injured party to rely on its responsibility.
2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Article 30

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these draft articles, of the

international organization which commits the act in question, or of any other international organization.¹⁸⁴

Considering that the ILC in the drafting work on State responsibility expressly reserved the matter addressed in these draft articles, and considering further that the practice of States and judicial and arbitral organs in this field remains rather limited, it will not be surprising if draft articles 25 through 30 are met with a combination of criticism (especially on the ground that practice discloses insufficient evidence to support them)¹⁸⁵ and neglect.¹⁸⁶ Writers already have warned that imputing responsibility to the constituent States might cast doubt on the viability of the international organization as a separate legal person.¹⁸⁷ The draft articles concerning attachment of responsibility to the Member State nevertheless are of considerable interest for present purposes. Several of them may be relevant to the responsibility of the Member States of the United Nations in connection with decisions to admit new members.

Draft article 29(1) would establish state responsibility in two situations: under paragraph 1(a), there would be responsibility where the Member State accepted it; and under paragraph 1(b), responsibility would attach to the Member State for a wrongful act of the organization where the Member State “has led the injured party to rely on its responsibility.” The ILC says that acceptance of responsibility for purposes of

184. *Id.*

185. For example, though referring to the draft articles as a whole rather than to particular provisions, Liu Zhenmin observed that “[China] wish[es] to see more references in the commentary to the legal and factual bases of the provisions.” Liu Zhenmin, *supra* note 50, ¶ 50. Larsen doubts that draft article 5 finds sufficient support in existing customary international law to merit its inclusion in the draft articles. See Larsen, *supra* note 169, at 518. Noting the “relative lack of practice and jurisprudence concerning international organizations,” Matheson suggests “[c]aution . . . particularly in adopting innovative formulations.” Michael J. Matheson, *Current Developments: The Fifty-Eighth Session of the International Law Commission*, 101 AM. J. INT’L L. 407, 438 (2007).

186. Bodeau-Livinec et al., *supra* note 180, at 330 (noting that the ECtHR, for example, had nothing to say about draft articles 25 through 30).

187. For a summary of the commentary on this point, see Andrew Stumer, *Liability of Members States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. INT’L L.J. 553, 564–69 (2007). See also José Alvarez’s comment:

But a more fundamental problem with the ILC’s proposal is that I am not sure that the principals here, namely the states, ever intended to make their organizations liable. It is certainly tenable that most [international organizations] were created in part to avoid legal liability or at least to create entities capable of doing some things that are denied to any one state

José E. Alvarez, *Governing the World: International Organizations as Lawmakers*, 31 SUFFOLK TRANSNAT’L L. REV. 591, 613 (2008). Stumer, however, concludes that “concern for the personality or independence of international organizations is not a sound reason” for denying secondary responsibility. Stumer, *supra* note 187, at 580.

paragraph 1(a) of draft article 29 is the “least controversial case.”¹⁸⁸ The absence of any qualification to the expression “has accepted responsibility for that act” means that acceptance for purposes of draft article 29(1)(a) may be “expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.”¹⁸⁹

Relating this to the question of responsibility for admission of an applicant to membership, one may ask whether the conduct of States in the General Assembly, such as their various statements welcoming new Members,¹⁹⁰ could have the effect of acceptance in the intended sense. The openness of the temporal limits—“may occur either before or after”—suggests that the law prescribes no precise relation between acceptance and the critical date—i.e., the date at which the organization has committed a wrongful act. This perhaps would make it easier to establish the subsidiary responsibility that draft article 29 contemplates, but the prior problem remains of identifying the State conduct amounting to acceptance. As will be considered shortly, the conduct of States pursuant to the decision-making procedures of the organs of an international institution generally does not give rise to responsibility. The *Tin Council* case, the example to which ILC Comment (7) refers, suggests that the main case is that in which the constituent instrument or other rules of the organization convey acceptance of responsibility.¹⁹¹

Paragraph 1(b) of draft article 29 sets out a second basis for responsibility of the Member State: a third party has relied on the Member State’s conduct as establishing its responsibility. Giving a financial guarantee in the event of the organization’s insolvency (the example given in Comment (8)¹⁹²) seems to be a mode of accepting responsibility, albeit prior to a contingent event. The relevant cases, including the Westland Helicopters dispute,¹⁹³ have involved expressions of “constant support” to the organization from the Member States, such that third parties would assume that the organization ultimately is backed up by its constituents.¹⁹⁴ The analogy, if any, to admission to the United Nations is the

188. 2006 ILC Report, *supra* note 46, at 289.

189. *Id.*

190. *See, e.g.*, REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 97 n.8 (1983).

191. 2006 ILC Report, *supra* note 46, at 289.

192. *Id.*

193. Westland Helicopters Ltd. v. Arab Org. for Industrialization, 80 I.L.R. 595, 613–14 (ICC Int’l Ct. Arb. 1982).

194. Commenting on this provision, the ILC accepted that the preexisting guarantee may invite responsibility but sought to clarify that this would also be the limit of responsibility—i.e., States guaranteeing the finances of the organization would not hold any responsibility in excess of the guarantee:

It may be that the international law of States’ [sic] responsibility should explicitly provide that individuals or States would have recourse . . . against member States of

situation in which a Member State promises material and political assistance to a newly admitted State. Such has sometimes been the practice where the newly admitted State is a territory for which the Member State had been responsible as administering power. The undertaking to assist the new Member State in many instances, however, is given after admission and thus could not have been an inducement to seek admission. Moreover, it would be hard to see how voluntary provision of aid is to be equated to "constant support," all the more so as "constant support" in the intended sense is support promised to the *organization*, not aid directed to the third party.

Draft article 30 makes clear that, whether or not in a given circumstance State responsibility has arisen, the general system of responsibility of international organizations remains in effect.¹⁹⁵

The other three draft articles in the chapter on "Responsibility of a State in Connection with the Act of an International Organization" relate to the influence that a State might exercise, lawfully or otherwise, on the conduct of an international organization.¹⁹⁶ Draft article 25 deals with a State which "aids or assists" an international organization; draft article 26, with a State which "directs and controls" an international organization; and draft article 27, with a State which "coerces" an international organization.¹⁹⁷ Aiding or assisting, directing and controlling, and coercing are three distinct actions. Their connection is that they involve the State in one way or another influencing the organization. In certain circumstances (which each draft article sets out), such action may entail the responsibility of the State.

Excluded however from the circumstances that may give rise to responsibility is the conduct of the State carried out as part of the State's

an international organization for actions that were taken by an international organization However, such legal doctrine should also clearly recognize that in the case of an international financial institution created to achieve legitimate collective goals, and not created as a means of shielding member States from responsibility in the discharge of pre-existing obligations, the exposure to liability of a member State (whose relationship to the organization is comparable to a shareholder in a corporation) for the acts or omissions of the organization should be limited to the amount of the financial contributions or guarantees of that member.

2004 *Comments*, *supra* note 31, at 10. Germany in its comments stated that the "charters of the international banks of which Germany is a member commonly limit the liability of the member States and shareholders to the value of their paid-in and payable shares." 2005 *Comments*, *supra* note 146, at 48. Examples cited are the Articles of Agreement of the World Bank, Bank for International Settlements, European Bank for Reconstruction and Development, European Investment Bank, African Development Bank, Asian Development Bank, and Multilateral Investment Guarantee Agency. *Id.*

195. 2006 *ILC Report*, *supra* note 46, at 261–62.

196. *Id.*

197. *Id.*

participation in the procedures and processes of the organization. Comment (2) to draft article 25 says as follows:

Should the State be a member, the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization. However, it cannot be totally ruled out that aid or assistance could result from conduct taken by the State within the framework of the organization. This could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.¹⁹⁸

According to Comment (2) to draft article 26,

[a]s in the case of aid or assistance [under draft article 25], a distinction has to be made between participation by a Member State in the decision-making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present draft article.¹⁹⁹

The same distinction is set out *mutatis mutandis* in the commentary to draft article 27 (coercion).²⁰⁰ This is to say that, for purposes of draft articles 25 through 27, a State does not aid or assist, direct or control, nor coerce, when it participates “in the decision-making process of the organization according to” its “pertinent rules.”²⁰¹ The IMF, in comments to draft articles 25 and 26, concurred.²⁰²

As noted in Comment (2) to draft article 25, borderline cases may arise where it is unclear whether a State’s conduct in the organization belongs to the exception and thus cannot be a basis for attribution. This supposes certain core cases where there would be little doubt. An organization has rules under which its Member States control its conduct. These in particular include the rules whereby an assembly, council, or other body comprised of some or all Member States reaches corporate decisions as to the disposition of the organization as a whole. In many organizations, the main membership bodies operate under a more or less developed parliamentary system. In the U.N. Security Council and General Assembly, the

198. *Id.* at 279.

199. *Id.* at 281.

200. *Id.* at 282.

201. *Id.* at 279, 281, 282.

202. 2007 Comments, *supra* note 31, at 19.

parliamentary system is highly developed.²⁰³ Voting under the procedures of the principal U.N. organs is clearly a core case. Accepting that it is, the draft articles would exclude a State's voting behavior within the United Nations as a basis for attribution to the State.

This situation seems broadly consistent with rules of parliamentary immunity found in national legal systems. The members of parliament are not individually responsible (under law) for the decisions taken by the legislatures in which they exercise a vote. Nor are their votes generally a basis for criminal or civil liability. Article I, section 6, clause 1 of the Constitution of the United States addresses, *inter alia*, the immunity of members of the House or Senate. According to the Speech or Debate Clause therein, "for any Speech or Debate in either House, they shall not be questioned in any other Place." This rather general constitutional provision equates to a wide immunity protecting acts done pursuant to parliamentary proceedings. The United States Supreme Court in *United States v. Brewster* for example said, "the Speech or Debate Clause prohibits inquiry . . . into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts."²⁰⁴ The refusal of the Supreme Court to look into "the motivation for legislative acts" recalls the refusal of the ICJ to look into "the reasons which, in the mind of a Member, may prompt its vote."²⁰⁵ The ECtHR also has considered that immunity is conferred "on members of Parliament in respect of their votes."²⁰⁶

The analogy to States in international organizations is not however exact. Certain principles underlie the immunity of national parliamentarians. With respect to a number of these, relations are difficult to find to the circumstances of an inter-governmental assembly. For example, representatives in national parliaments represent "the people"; citizens under one legal system clothe certain of their fellow citizens with authority to reach collective decisions on their behalf.²⁰⁷ States in the United Nations by contrast are the main constituents of the relevant legal system, not representatives of others; the development of democratic

203. See, e.g., SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* (3d ed. 1998) (providing extensive treatment of the parliamentary system and procedure of the U.N. Security Council).

204. *United States v. Brewster*, 408 U.S. 501, 512 (1972).

205. *Conditions of Admission of State for Membership in United Nations*, Advisory Opinion, 1948 I.C.J. 57, 60 (May 28).

206. *Cordova v. Italy* (No. 1), 2003-I Eur. Ct. H.R. 231, 243 (noting, without rejecting, the statement of the Government of Italy regarding immunity for votes).

207. See, e.g., *id.* ("The Government [of Italy] noted that . . . immunity [serves] to ensure that the representatives of the people enjoyed the greatest possible freedom of expression in the exercise of their functions. . . ."). See also the Government's observations in *Lingens v. Austria*, App. No. 8803/79, 4 Eur. H.R. Rep. 373, 381 (1981).

principles in international organizations has not advanced to the point that States are like republican tribunes, their inhabitants like world citizens. The common law origin of parliamentary immunity in national systems²⁰⁸ is also a feature distinguishing it from the international situation. It well may be that “[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.”²⁰⁹ The international legal system, including international organizations, is much harder to separate from the interests of States. The purpose of the modern human rights project well may be to achieve such a separation. It, too, has some distance to progress before being complete. As for the concern over independence and separation of powers (“free[dom] from the cognizance or coercion of the coordinate branches”), these similarly are difficult to transpose directly to the international setting.

Whatever the origins in legal principle behind the rules of immunity and attribution, it is fairly clear that responsibility will not attach to Member States for votes they cast on applications for admission to membership. Owing to their character as participants in the constitutional system of the Organization, the Member States will not be responsible even if their votes are in breach of Article 4 or other relevant provisions of the Charter.

The same is not the case with respect to decisions reached by organs of the organization. Decisions of the Security Council or General Assembly clearly may engage the responsibility of the United Nations. Draft article 4, paragraph 1 on Responsibility of International Organizations states that “[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.”²¹⁰ Comment (3) to draft article 4 sees the *Cumaraswamy* Advisory Opinion²¹¹ as encompassing within conduct of the United Nations conduct of its principal and subsidiary organs as well as conduct of its agents.²¹² Comment (5)

208. *United States v. Johnson*, 383 U.S. 169, 178 (1966).

209. *Brewster*, 408 U.S. at 507.

210. *2004 ILC Report*, *supra* note 54, at 103.

211. *Difference Relating to Immunity from Legal Process of Special Rapporteur of Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 88 (Apr. 29).

212. *2004 ILC Report*, *supra* note 54, at 105–06. With respect to agents, there often will be questions of immunity. *Id.* (“[T]he question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents in their official capacity.”); *see also 2004 Comments*, *supra* note 31, at 26–27 (comment of the IMF).

says, “[w]hen persons or entities are characterized as organs by the rules of the organization, there is no doubt that the conduct of those persons or entities has to be attributed, in principle, to the organization.”²¹³ The Swiss Federal Council says, “[a]s a rule, one may attribute to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competences.”²¹⁴ The U.N. Charter Article 7 identifies the Security Council and General Assembly as two of the six “principal organs of the United Nations.” The ICJ was clear that controlling admission to membership is one of the functions of those organs.²¹⁵ Even where the organ or agent of an international organization exceeds its competence, the presumption is in favor of responsibility.²¹⁶

If casting a vote that results in a particular decision by the central organs of the organization is not a basis for attribution, then the Member State will not be held responsible for a decision by the principal organs to admit an applicant. Therefore, the responsibility of the organization, not of its Member States, is the relevant consideration. The ILC apparently proposed draft article 30 as a saving clause to make clear that the lack of a basis for attribution to the Member States does not equate to immunity for the organization as a whole.²¹⁷ Assuming that the organization indeed is the only possible holder of responsibility for decisions to admit a State to membership, the question then arises how the organization might be held accountable. This question presents distinct and significant problems.

B. Mechanisms of Accountability: A Continuing Search

The second problem that responsibility of an international organization entails is the underdevelopment of a system in international law to render international organizations accountable. This is not an obstacle to attribution: conduct may be attributed to an actor without regard to mechanisms of accountability. The problem instead is one of implementing practical responses—that is, of finding mechanisms of accountability—once attribution is established. A situation may arise in which the responsibility of the international organization is clear and, as

213. 2004 ILC Report, *supra* note 54, at 106; see also *Second Report of Special Rapporteur Gaja*, *supra* note 148, ¶¶ 14–19, at 8–10. The main question in practice often will be to prove the functional link between the agent or organ and the organization necessary to establish attribution.

214. Decision du Conseil Federal, Doc. VPB 61.75 (Oct. 30, 1996) (Switz.) *cited in* 2004 ILC Report, *supra* note 54, at 106.

215. Competence of General Assembly for Admission of State to United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3).

216. See 2004 ILC Report, *supra* note 54, ¶ 9, at 107; *id.* ¶¶ 1, 2, at 115–16.

217. 2006 ILC Report, *supra* note 46, ¶ 2, at 291–92.

is usually the case, the Member States remain insulated against responsibility (even as it was their voting decisions in the organs of the organization that led to the act or omission giving rise to responsibility). With responsibility well established, it still may be that no mechanism of accountability exists to provide a remedy.

Member States of the United Nations by virtue of Article 93 of the Charter are *ipso facto* parties to the Statute of the ICJ and, as such, they potentially have standing to institute proceedings before the Court. Article 34(1) of the Statute of the ICJ stipulates that “[o]nly States may be parties in cases before the Court.” International organizations are not parties to the Statute and cannot be parties in contentious proceedings. That is to say, an international organization cannot institute contentious proceedings in the Court; nor can a State or other party institute contentious proceedings against an international organization.²¹⁸ This begins to indicate the problem of accountability with respect to the responsibility of international organizations.

James Crawford, in the Fifth Steinkraus-Cohen International Law Lecture (2007),²¹⁹ described five mechanisms that may ameliorate the accountability deficit²²⁰: (i) international organizations may adopt moral criticisms of their own conduct, as the United Nations did in connection with Rwanda and Srebrenica;²²¹ (ii) internal auditing mechanisms may examine the projects of an organization (the World Bank Inspection Panel is the main example);²²² (iii) absent relationships in which the international organization itself has full operational command of forces (tantamount to secondment), Member States may be responsible for acts they perform under the organization’s mandate;²²³ (iv) where

218. For an overview of jurisdiction and standing in contentious cases, see Crawford & Grant, *THE OXFORD HANDBOOK ON THE UNITED NATIONS* *supra* note 153, 193, 195–96, 198.

219. Steinkraus-Cohen Lecture, *supra* note 30.

220. *Id.* ¶¶ 15–26.

221. *Id.* ¶¶ 16–17 (citing The Secretary-General, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, at 3, U.N. Doc. S/1999/1257/Annex, (Dec. 16, 1999); The Secretary-General, *Report of Secretary-General Pursuant to Resolution 53/35 of the General Assembly on the Fall of Srebrenica*, U.N. Doc. A/54/549 (Nov. 15, 1999)).

222. *Id.* ¶ 19.

223. *Id.* ¶ 20 (referring to the North Atlantic Treaty Organization (NATO) operations against Serbia); *see also Second Report of Special Rapporteur Gaja*, *supra* note 148, ¶¶ 33–48, at 16–23 (addressing at length the matter of attribution in connection with peacekeeping operations). The U.N. Secretariat commented:

As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping op-

international action is carried out on behalf of a State, the State itself may assume responsibility for the consequences of the action (this seems to have been the result reached by the Constitutional Court of Bosnia and Herzegovina in the appeal of *Bilbija and Kalinić*);²²⁴ and (v) secondary or subsidiary responsibility may be attached to States for the conduct of international organizations, as proposed in the Draft Articles on Responsibility of International Organizations.²²⁵ The third, fourth, and fifth mechanisms avoid the problem of the lack of accountability of international organizations by bringing the matter back to the Member States, namely, by revising the rules of attribution—shifting

eration does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.

....

The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In authorized Chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where *effective* command and control is vested and practically exercised.

Id. at 17–18 (citation omitted); see also 2005 Comments, *supra* note 146, at 28–29 (comment of the Democratic Republic of the Congo on “[a]ttribution of the conduct of a peacekeeping force to the United Nations or to contributing States”); *id.* at 63 (comment of Germany on “[r]esponsibility of troop-contributing nations in United Nations operations”).

224. Milodrad Bilbija & Dragan Kalinić, Case No. AP-953/05, Judgment of 8 July 2006, ¶¶ 9, 12; Steinkraus-Cohen Lecture, *supra* note 30, ¶¶ 21–25 (citing Appeal of Milorad Bilbija and Dragan Kalinić, Case AP-953/05 (Jul. 8, 2006) (Bosn. & Herz.)). Note however that the High Representative (the international organ acting in Bosnia) had a sharp response to the Constitutional Court, even though the latter had gone to lengths to emphasize the continued effectiveness and binding character of decisions of the former:

Any step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation of the civilian aspects of the General Framework Agreement for Peace in Bosnia and Herzegovina and shall be treated in itself as conduct undermining such implementation.

Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija, art. 2, AP-953/05 (Mar. 23, 2007). International organs evidently do not take kindly to attempts to curtail their freedom from accountability. For comment on the Order of March 23, 2007, see Thomas D. Grant, Cyprus Policy Center Conference on the Cyprus Conflict: Looking Ahead: The Dayton Settlement in Bosnia and Herzegovina as Post-Conflict Model: Lessons for Cyprus, 8–10 (May 7, 2007), available at http://cpc.emu.edu.tr/haber_oku.asp?haber=57 (last visited July 7, 2009).

225. Steinkraus-Cohen Lecture, *supra* note 30, ¶ 26.

attribution of the wrongful act from the less accountable organization, to the more accountable Member State.

In addition to the five mechanisms described, there is the internal system of dispute settlement within the United Nations under Article VIII of the General Convention on Privileges and Immunities of the United Nations.²²⁶ The system is limited however to contractual and employment disputes that, it has been said, fall under a “*lex specialis* as between the organization and its members and agents and among its members.”²²⁷ The system does not as such “provide any avenue for redress as to the public activities of the Organization.”²²⁸ Claims practice for violations of international law by an international organization, unsurprisingly, is sparse.²²⁹ A further way to increase accountability for public activities would be to establish contentious jurisdiction before the ICJ over international organizations (including the United Nations and its specialized agencies). This would have the virtue of directness, but is probably unattainable given the political hurdles to Charter amendment.²³⁰

V. CONSEQUENCES OF ADMISSION AND THE PROBLEM OF CAUSATION

Assuming that a party against which a breach has occurred can be identified, and a party exists to which the wrongful act attaches, it then is necessary, if reparation is due for the breach, to specify injuries that the breach has caused. Injuries are a subset of the total consequences of the wrongful act, but, crucially, they are not a necessary subset: a wrongful act does not in every instance entail compensable injuries to the party wronged. The award in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* illustrates how, for example, a State can breach a bilateral investment treaty without having “caused” an injury in the relevant

226. See Convention on the Privileges and Immunities of the United Nations art. VIII, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15.

227. 2005 *Comments*, *supra* note 146, at 38 (comment of the IMF). WIPO, however, took the position that “established or generally accepted principles of international law” also should be applied in the relations between an organization and its Member States and its agents. *Id.* at 39.

228. Steinkraus-Cohen Lecture, *supra* note 30, ¶ 13.

229. See 2004 *Comments*, *supra* note 31, at 28–33 (comments of the International Atomic Energy Agency (IAEA), IMF, Multinational Force and Observers, Organization of American States, Organisation for the Prohibition of Chemical Weapons, United Nations Development Programme, WHO, and World Trade Organization that no claims had been made against their respective agencies alleging violations of international law).

230. On the (limited if “inevitable”) role of the International Court of Justice (ICJ), see KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS 224–61 (2002).

sense.²³¹ A general question therefore first should be asked: what are the consequences of admission of a State to membership in the United Nations? This avoids a question-begging formulation that would assume the consequences to be injurious. In many cases, it is nearly impossible to see how they could be. After all, admission of Switzerland has not caused identifiable injury to any party! It was suggested at the beginning of this Article that the consequences of admission of a State to membership in the United Nations are clear enough, with respect to the internal operations of the United Nations and to the State's obligations as a member. The question presented, then, is what wider effects admission may have, and how, if at all, any of them, at least in particular circumstances, might constitute an injury upon which a party could claim reparation.²³²

It is therefore important to bear in mind, then, that the word "effects," as used in the ILC's work on responsibility, has a broad meaning. It includes both lawful effects and unlawful effects; and it includes both effects that may be traced back to a prior act for purposes of reparation and those that are logically too far separated from the prior act to give rise to a new legal situation for the actor. This second distinction brings theories of causation into play. There are effects in a general logical sense (act *X* is a necessary predicate to effect *Y*—but for *X* there could have been no *Y*); and there are effects in the sense that a given act has a legal connection to its result. The legal connection that concerns us here is that giving rise to responsibility on the part of the party having performed the act, such that the party has a new obligation—namely, the obligation to make reparation. Some theories of causation may require a fairly close link between the act and its effects, if for purposes of responsibility the effects are to be attached to the party having authored the act.²³³ Or, perhaps, the legal connection may exist where the link between act and effect is not so close. Proximity may be measured in time, physical space, or other relationships. Even under a theory requiring less proximity, "the law arbitrarily declines to trace a series of events beyond a certain point."²³⁴ To fix responsibility on some party for an act is to

231. *Biwater Gauff, Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, ¶¶ 461–67 (2007).

232. When the IAEA examined its international responsibility in relation to activities under the Comprehensive Safeguards Agreements adopted after the Treaty on the Non-Proliferation of Nuclear Weapons, it implied that a necessary step to defining its responsibility is to identify which activities under the Agreements might give rise to damage. 2004 *Comments*, *supra* note 31, at 25–26. This in turn implied that certain other activities cannot give rise to damage. A better approach is to consider first the consequences of a given activity and then to consider whether any of those consequences are injurious, rather than to exclude *a priori* that given activities may be injurious.

233. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

234. *Id.* at 103 (Andrews, J., dissenting).

identify an act having consequences traceable to the party for legal purposes. The relevance of legal theories of causation arises in this connection.

The admission of a State to membership in the United Nations has a number of consequences, each of which will be noted below in turn. It then will be considered whether a given consequence is sufficiently proximate to the act of admitting the State that it might have a legal connection to the party that reached the decision to perform the act. Finally, if a given consequence is injurious, it will be asked whether one may speak of an obligation to make reparation.

A. Consequences of admission

1. Consequences Relative to Statehood

The admission of a State to the United Nations does not create the State. This point has been made elsewhere. For example, the ICJ could say that “[t]here is no doubt that Serbia and Montenegro is a State for the purposes of Article 34, paragraph 1, of the Statute”—before it said whether that State was a member of the United Nations and thus a Party to the Statute by virtue of Article 35(1).²³⁵ It follows from earlier practice as well: States existed before there was a United Nations. It follows even more closely from the logic of the Charter: to be admitted, the applicant must already be a State.

Moreover, the rights and obligations of a State under general international law clearly do not begin with admission. It is central to an understanding of international law as guarantor of basic public order that any particular formal status—such as membership in an international organization—cannot be the prerequisite to protection from the use or threat of force: a State does not acquire license to use force at the international level simply by denying the status of the target of its contemplated aggression.²³⁶ Admission of a State as a member of the United Nations is therefore clearly not the act creating the obligation to refrain from threat or use of force against the territorial integrity of the State. Nor is continued membership a requirement for continued statehood. Sean Murphy notes that suspension from an organization—from

235. *Legality of Use of Force (Serb. & Mont. v. Belg.)*, 2004 I.C.J. 279, 298–99 (Dec. 15).

236. Consider the highly concerning remarks by Russian officials about Georgia. Vitaly Churkin, Russian Permanent Representative, Statement at U.N. Security Council Debate (Aug. 8, 2008), available at <http://www.unmultimedia.org/tv/unifeed/d/12799.html> (last visited June 13, 2009) (saying that Georgia’s conduct “calls into question the viability of Georgia as a state”). The unspoken position is that lack of “viability” strips Georgia of the normal international law protections. This is clearly an unfounded position and if accepted would be inimical to public order.

the Organization of American States (OAS) for example—by no means calls into question the existence of the State suspended.²³⁷

Yet the relation between statehood and membership in the United Nations is significant. The requirement under Charter Article 4(1) that, to be admitted, the applicant be a State forges a link between the United Nations and statehood. It means that admission, at the very least, is a certification by the Organization as to the status of the entity as a State.²³⁸ Given its role as the chief organized expression of international society and the (continued) position of States as the main components of that society, the United Nations is more than a passive observer of such matters. The move toward universal membership in the United Nations tends to increase the significance of the relation between membership and statehood. If the States of the world and the United Nations were to form an identity, then that in itself would be significant.

The link between the United Nations and statehood is reflected in international instruments as well. Under Rule 2 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, three categories of entities are States for purposes of the Rules. The first category is “a State Member or non-Member of the United Nations.”²³⁹ Again, although it is clear that membership in the United Nations is not a prerequisite to statehood, nor does admission constitute the State, there exists a natural relation between statehood and U.N. membership. Why else define the category “State” by reference to membership at all? That a drafter would have thought it necessary to clarify that the category is not limited to U.N. membership reflects the tendency to think of U.N. membership and statehood as coterminous.

The relation between statehood and U.N. membership is not controversial, at least at some level of generality. After all, the Organization is open to “all other peace-loving states.” Writers have observed the connection between U.N. membership and statehood.²⁴⁰ According to Martin Dixon, U.N. membership “will now entail a presumption of statehood which it would be very difficult to dislodge.”²⁴¹ Rosenne says admission

237. Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 123, 129 (Gregory H. Fox & Brad R. Roth eds., 2000).

238. Compare MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 99 (Blackstone 3d ed. 1996), with MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* (Oxford Univ. Press 5th ed. 2005) [hereinafter DIXON, *TEXTBOOK ON INTERNATIONAL LAW* (2005)].

239. Int'l Tribunal for the Former Yugoslavia [ICTY], *Rules of Procedure and Evidence*, at 2, U.N. Doc. IT/32/Rev.40 (June 12, 2007).

240. E.g., W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 230–31 (2004); SHAW, *supra* note 158, at 180–81; BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK* 364 (3d ed. 1997).

241. DIXON, *TEXTBOOK ON INTERNATIONAL LAW* (2005), *supra* note 238, at 105.

has a confirmatory effect as to the statehood of the admitted applicant.²⁴² Admission confirms that the statehood of the admitted entity is opposable against all other members. This is not to say that U.N. admission is the only mechanism that can establish such opposability. A State is a State for reasons other than its admission to the United Nations and, even as they have no duty formally to recognize it as such, other States are not free to act as if a given State does not exist.²⁴³ U.N. admission, entailing the participation of all members in a multilateral treaty, may be described as putting a formal frame around the opposability of statehood toward all other U.N. members.

It would serve no purpose to revisit the extensive literature devoted to the question of the legal consequences of the recognition of States.²⁴⁴ As for the relation between recognition and admission to the United Nations, John Dugard addressed the matter in *Recognition and the United Nations*. Some writers rejected the proposition that the United Nations might serve as a collective mechanism for recognition on grounds that the General Assembly was not equipped to serve that function.²⁴⁵ Dugard then set out the main strands of thought on the matter:

Many writers, who favour collective recognition, acknowledge that admission to the United Nations has had a major impact on the law of recognition, but stop short of accepting it as an act of recognition in itself. Thus we find admission to the United Nations described as "a kind of collective recognition," "a step forward towards the principle of collective recognition," the "nearest analogue" to collective recognition, "a system of certification which has in substance fulfilled the function of collective recognition," "*prima facie* evidence of statehood," "tantamount to recognition of the member admitted as a State," and as a substitute, "to a large extent, but not for all aspects," of traditional recognition. In more futuristic vein, Chen declares that "[w]hen the United Nations shall have attained complete universality, the notion of 'recognition' will wither away, and

242. SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATISES 1945-1946*, at 215 (1989).

243. Cf. Hans Blix, *Contemporary Aspects of Recognition*, 130 *RECUEIL DES COURS* 589, 693 (1970) ("[B]y accepting treaties constituting international organizations, [the Member States] must be deemed to have obliged themselves to accept the measure of relations which is necessary under these constitutions—but not more—with authorities which fulfill the international law criteria of governments of States members, although, in pursuit of a policy of non-recognition, they may refuse relations outside the framework of such organizations.").

244. The legal "nature" of recognition is considered *in extenso* in THOMAS D. GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* 1-82 (1999).

245. DUGARD, *supra* note 80, at 43-44.

membership of the United Nations will be the sole standard of relations between States.”²⁴⁶

That recognition indeed appears to have lessened in importance as part of international practice over roughly the same period that the United Nations has so nearly approximated universality tends to support Chen’s declaration. Yet States still include recognition in their repertoire of practice, and admission to the United Nations remains at most a “near analogue” to collective recognition. That recognition both is an act left largely to the discretion of individual States—notwithstanding occasional indications to the contrary²⁴⁷—and that its political character remains pronounced further suggest the qualified role of the United Nations in this connection.

As Brownlie says,

[r]ecognition, *as a public act of state*, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally if they ignore the basic obligations of state relations.²⁴⁸

The principle runs the other way as well, it being doubtful whether recognition of an unlawful situation, especially where the rule breached is *jus cogens*, will “offset the original illegality.”²⁴⁹ The question well may be put, as it was under the Stimson Doctrine, whether recognition of an unlawful situation itself is an unlawful act.²⁵⁰ It certainly may be an *unfriendly* act, as against the party that the underlying unlawfulness has injured.²⁵¹ Insofar as one may draw an analogy between admission to the United Nations and recognition, the same considerations as apply to “traditional” recognition would apply *mutatis mutandis*.²⁵²

246. *Id.* at 44–45 (citing TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 222 (1951)).

247. GRANT, *supra* note 244, at 149–211 (examining the case of Yugoslavia).

248. BROWNLIE, *supra* note 147, at 89–90 (emphasis in original).

249. *Id.* at 78.

250. See Thomas D. Grant, *Doctrines (Monroe, Hallstein, Brezhnev, Stimson)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 8–15, 40 (3d ed. 2009).

251. G.A. Res. 3314 (XXIX), Annex art. 5(3), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974) (“No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.”). A similar statement is included under the first principle of the Friendly Relations Declaration. International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626 (XXV), Annex, U.N. GAOR, 25th Sess., U.N. Doc. A/8124 (Oct. 24, 1970).

252. 2007 *ILC Report*, *supra* note 11, ¶ 344, at 218 (draft article 45(2), providing that “[n]o State or international organization shall recognize as lawful a situation created by a serious breach [by an international organization of an obligation arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation”).

2. Legal Cover

Difficulties arise when a State acts under cover of an international organization. Namely, conduct authored by the State may be imputed to the organization and responsibility thus shifted away from the one entity subject to developed mechanisms of accountability. This problem, which is the problem of attribution discussed above,²⁵³ is connected with admission, for it potentially arises whenever a State participates as a member of an organization. One consequence of admission, then, is the potential shielding of the Member State from responsibility for acts which the law otherwise might impute to it.

The situation may differ between admission to the United Nations and admission to considerably smaller organizations. An international organization with only a handful of members may be open to greater scrutiny, if membership in the organization (or its very creation) provides legal cover to its members for acts for which they otherwise would have to answer directly. However, scrutiny does not necessarily result in removal of the legal cover. The House of Lords took a hard look at the Sixth Tin Council, and the Member States remained insulated from responsibility.

It may not always be that way. In the *NATO cases*, for example, the lack of jurisdiction meant that the ICJ did not need to reach the question of attribution. Germany, among other States, said that responsibility does not arise “by reason of membership for measures taken by . . . [the North Atlantic Treaty Organization (NATO)].”²⁵⁴ Yet there were indications, albeit rather faint, that NATO membership might not have been a defense against responsibility. Yugoslavia, unsurprisingly, assumed that the Member States were responsible.²⁵⁵ Such a position taken by one State engaged in proceedings is not necessarily persuasive on its own as evidence of a general position. The Court however admonished the Parties that a failure of jurisdiction does not absolve States of their obligation to abide by international law, including the rule that disputes are to be

For references to the requirement of non-recognition of the unlawful annexation of Kuwait by Iraq in S.C. Res. 664, ¶ 2, U.N. Doc. S/RES/0664 (Aug. 9, 1990), see *Fifth Report of Special Rapporteur Gaja*, *supra* note 108, ¶ 64, at 19; *2007 ILC Report*, *supra* note 11, ¶ 344, at 220 (comment (7) to draft article 45); see also Declaration by the European Community on Yugoslavia and on the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485, 1487 (stating that “[t]he [European] Community and its member States will not recognize entities which are the result of aggression”). Admission of an entity to membership, where States and international organizations are under an obligation to refrain from acts tending to confirm or consolidate the status of the entity, is a breach of the obligation. This is the clear case of admission as wrongful act.

253. See *supra* Part V.

254. *2005 Comments*, *supra* note 146, at 65.

255. See, e.g., *Legality of Use of Force (Yugo. v. Can.)*, 1999 I.C.J. 259, 268 (June 2).

resolved by peaceful means. The Court admonished the respondents in terms which avoided saying whether acts done in the framework of NATO could be attributed to them: "[W]hether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law."²⁵⁶ If it were *prima facie* the case however that acts done in the framework of NATO cannot be attributed to the Member States of that organization, then it would be hard to justify even the Court's passing reference to continued responsibility. The Court, while unable to dispose of the matter, did not remain silent about it.²⁵⁷

The discussion here of specialized organizations is not to say that they are the only types of organizations that Member States might use to shield themselves from international responsibility. On the contrary, Member States might use a universal organization for legal cover as well. The possibility exists that mandates of the Security Council will shield States from attribution. Hypothetically, a State might seek admission to the United Nations for purposes of obtaining cover for unlawful acts. This, perhaps, would be a case of admission as a wrongful act.²⁵⁸

3. Legal Exposure

As membership in the United Nations may give a State cover from wrongful acts that otherwise could be attributed to it, so conversely may accession to independence—the predicate to admission—expose the State to legal and other risks that the dependent territory did not face. Communities aggregate into States for various reasons. One reason is to limit the exposure of each community to risk. By existing under a single State—which also is to say existing under a single legal system—

256. Legality of Use of Force (Yugo. v. U.S.) 1999 I.C.J. at 916, 925 (June 2); Legality of Use of Force (Yugo. v. Spain), 1999 I.C.J. 761, 773 (June 2).

257. For works addressing the relation between the Member States and NATO in connection with the Kosovo operations, see citations in *Second Report of Special Rapporteur Gaja*, *supra* note 148, ¶ 7, at 4 n.9.

258. This recalls but is distinct from the situation in which admission must be declined for the reason that it would tend to confirm an unlawful situation. The South African Homelands were not admitted as Member States of the United Nations, on grounds *inter alia* that admission would have tended to confirm the policy of Apartheid of which they were an instrument. The hypothetical situation is one in which a State seeks membership, with a view to carrying out unlawful acts under the auspices of the organization. Perhaps, for example, a State seeks theaters in which its armed forces operate under minimal supervision, the State having no regard to the lawfulness of the conduct of those forces. (Political theorists have said that States sometimes use foreign military adventure as an outlet for domestic crisis. The *locus classicus* is JOHN A. HOBSON, *IMPERIALISM: A STUDY* 384 (1902)). The peacekeeping operations of the United Nations could be a channel to such theaters, a possibility suggested by the misconduct of national contingents in some operations. To date, the problem has not arisen in connection with admission to membership; in practice it would be hard to say in advance of admission that an applicant was seeking to use membership as a shield for unlawful activity.

multiple communities can share risks and, in the event a particular risk materializes, they can draw on one another's resources to aid in recovery from harm. The smaller the State in terms of material resources, the more concentrated the risk; and the more difficult the recovery.

International law contains little if any obligation to render material assistance to other States. The duty to make reparation comes into existence where responsibility is established. Responsibility is established in certain, but not all, situations where a State has suffered harm. Natural disasters, for example, are not treated as any State's fault and thus are not cognized in the law of responsibility.²⁵⁹ As such, the international legal system does not include a mandatory system of cost-spreading when such events cause injury to or within a State. Accession to independence brings certain benefits associated with international legal personality; once independent, the community, as a State, has access to international processes that it did not when it existed as part of another State. However, rendering assistance to mitigate injuries such as those resulting from hurricanes, earthquakes, crop failures, and the like, is not an obligation in international law and receiving such assistance thus is not a right associated with international legal personality. If what is sought is mandatory cost-spreading, the independent State is restricted to adopting its own measures, under its own laws, which by definition apply only to the extent of the State's own jurisdiction. The independent State, while part of international legal processes, is isolated in this other significant respect.

The limits of the State's jurisdiction mark the limits of the zone within which (national) law may require cost-spreading. The independent State is a community under no laws except international law and its own law, and the former seems unlikely to compel other communities to render assistance. Accession to independence thus has consequences for the capability of the State to weather the vicissitudes that any given territorial community may face. If the practice of the United Nations in so readily admitting States to membership has encouraged the accession of so many communities to independence then, perhaps, admission is the act which has led the new States to exist in such legal exposure.

259. The ILC in 2007 appointed Mr. Eduardo Valencia-Ospina Special Rapporteur for the topic of "[p]rotection of persons in the event of disaster." 2007 ILC Report, *supra* note 11, ¶ 375. The topic had been added to the ILC agenda that year. G.A. Res. 62/66, ¶ 7, U.N. Doc. A/RES/62/66 (Jan. 8, 2008). The Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses considered, under the heading "water-related hazards and dangers," the distinction between man-made and natural disasters. ILC, *Fifth Report on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 3–4, U.N. Doc. A/CN.4/421 (May 19, 1989) (prepared by Stephen C. McCaffrey).

The legal exposure of very small States is particularly acute. A hypothetical case is that of the Small Island Developing State (SIDS) in the face of climate change.²⁶⁰ The risk exists that rising sea levels will injure many States in the SIDS category; it may already have begun to do so. The injury in certain cases, such as the Federated States of Micronesia, the Marshal Islands, the Maldives, and the Bahamas could amount to the total loss of national territory (if sea level increase were to turn out to be as significant as pessimistic forecasts say). If the affected territory were part of a larger national legal system, then that system could adopt compulsory measures to assist the inhabitants and thus to mitigate the consequences of the harm. As a State, however, such territory would have to rely upon whatever compulsory measures its own legislature adopted. These would serve scarcely any use in face of the total loss of the material base of the national society. The situation perhaps reflects a gap in international humanitarian law.

4. Access to the International Court of Justice

Only States may be parties to cases before the ICJ,²⁶¹ but it is not necessary to be a Member State of the United Nations in order to be a party to a case. Before admission to the United Nations, a State may become a party to the statute of the ICJ, and in this way may be a party to a case in the ICJ: the Court "shall be open to the states Parties to the . . . Statute."²⁶²

Becoming a party to the Statute, for a non-Member State, is by way of action taken under Charter Article 93(2), meaning "on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." Switzerland was the first to become a party to the Statute without first having been admitted as a Member State to the United Nations. Acting under Article 93(2), the General Assembly determined

Switzerland will become a party to the Statute of the Court on the date of the deposit with the Secretary-General of the United Nations of an instrument, signed on behalf of the Government of Switzerland and ratified as may be required by Swiss constitutional law, containing:

260. See Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barb., Apr. 6-25, 1994, U.N. Doc. A/CONF.167/9 (Oct. 1, 1994); The Secretary-General, *Report of the Secretary-General: A Development Strategy for Island Developing Countries, delivered to the General Assembly*, U.N. Doc. A/49/227 (July 18, 1994). For more recent initiatives, see Small Islands Developing States Network, http://www.sidsnet.org/SIDSDay_Index.html (last visited July 7, 2009).

261. Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055.

262. *Id.* art. 35(1).

- (a) Acceptance of the provisions of the Statute of the International Court of Justice;
- (b) Acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter;
- (c) An undertaking to contribute to the expenses of the Court such equitable amount as the General Assembly shall assess from time to time after consultation with the Swiss Government.²⁶³

Japan, Liechtenstein, San Marino, and Nauru later became parties to the Statute in the same way.²⁶⁴ The conditions for each were the same as for Switzerland.²⁶⁵ When conditions were set for Switzerland to become a party to the Statute, a Security Council Committee of Experts emphasized however that the conditions for one State under Article 93(2) are not necessarily the same as for another: “[T]he conditions recommended above as appropriate to the case of Switzerland are not intended to constitute a precedent to be followed either by the Security Council or by the General Assembly in any future case under Article 93, paragraph 2, of the Charter.”²⁶⁶ In practice, the “conditions recommended” did not change, and one might conclude, therefore, after a half century that a precedent has been established. The plain language of Charter Article 93, paragraph 2 nevertheless remains.

Writers have said that the universality of the United Nations removes the possibility of a non-Member State seeking to become a party to the Statute; as such, Article 93(2) is unlikely again to be called into use. The situation of “new States com[ing] into existence without applying for membership in the United Nations,” wrote Karin Oellers-Frahm in 2006, “seems to be rather hypothetical.”²⁶⁷ The declaration of independence of Kosovo in the face of objections of permanent members of the Security Council perhaps makes the situation rather less hypothetical.

It is also possible for a State neither a Member State of the United Nations nor a party to the Statute of the ICJ to be party to a case. Article 35(2) of the Statute provides as follows:

263. Conditions on Which Switzerland May Become a Party to the International Court of Justice, G.A. Res. 91 (I), at 15, U.N. Doc. A/RES/91 (I) (Dec. 11, 1946).

264. Karin Oellers-Frahm, *Article 93 UN Charter*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 153, 157 (Andreas Zimmermann et al. eds., 2006).

265. *Id.* at 153, 157 n.23.

266. *Report and Recommendation of the Committee of Experts of the Security Council Concerning the Conditions on Which Switzerland May Become a Party to the Statute of the International Court of Justice*, G.A. Res. 91 (I), Annex ¶ 6, U.N. Doc. A/RES/91(I)/Annex (Dec. 11, 1946) [hereinafter UN Report on Switzerland].

267. Oellers-Frahm, *supra* note 264, at 158.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

The clause "the special provisions contained in treaties in force" has been limited, "without any textual warrant," to treaties in force in 1945, so its practical significance is small, if any remains at all.²⁶⁸ Still operative is the phrase "conditions under which the Court shall be open to other States . . . shall be laid down by the Security Council." The Security Council adopted Resolution 9 to lay down conditions pursuant to Article 35(2):

The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.²⁶⁹

Resolution 9 is the instrument that operationalizes Article 35(2) of the Statute.²⁷⁰

All Member States of the United Nations are "*ipso facto* parties to the Statute."²⁷¹ For States not members of the United Nations, the existing conditions for gaining access to the ICJ are not as stringent as the criteria for being admitted to the United Nations. This is the effect of Charter Article 93(2), Statute Article 35(2), and associated practice. A State under Charter Article 93(2) or Security Council Resolution 9 gains

268. Crawford & Grant, *supra* note 153, at 207 n.10.

269. S.C. Res. 9, ¶ 1, U.N. Doc. S/RES/9 (Oct. 15, 1946) [hereinafter Resolution 9].

270. *Id.* Resolution 9 also provides that a State making a declaration under its terms may accept compulsory jurisdiction under Article 36 paragraph 2. *Id.* However, the State so accepting compulsory jurisdiction puts itself on a different footing from a Member State having accepted compulsory jurisdiction: Resolution 9 provides that "such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2." *Id.* ¶ 2. For reconciliation of this difference to the equality provision of Article 35, paragraph 2, see Andreas Zimmermann, *Article 35, in STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, supra* note 264, at 565, 585–86.

271. U.N. Charter art. 93, para. 1.

access to the Court by affirming its commitment to the ICJ Statute and to Article 94 of the Charter (and by assuming certain financial obligations). The conditions were therefore the same for non-Member States seeking to become parties to the Statute, and for non-Statute States seeking access to the Court. Setting a uniform set of conditions apparently was intended.²⁷²

Yet, as pointed out above, notwithstanding consistent practice, it was not the Charter that determined the conditions for Switzerland to become party to the Statute. The General Assembly determined the conditions acting on the recommendation of the Security Council under Charter Article 93(2). Different conditions could be set in a future case. The conditions set out in Security Council Resolution 9 are expressly applicable to all States seeking access under Statute Article 35(2)—but only for so long as Resolution 9 remains in effect. Those conditions, too, then, are not necessarily permanent. The Security Council in Resolution 9

reserves the right to rescind or amend this resolution by a resolution which shall be communicated to the Court, and on receipt of such communication and to the extent determined by the new resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.²⁷³

Neither the Charter nor the Statute specify what the scope of the conditions for participation by non-Member States might be. As noted, the existing conditions for a non-U.N. Member State to gain access to the ICJ are not as stringent as the criteria for being admitted to the United Nations. The non-U.N. member, whether seeking access by way of accession to the Statute or under Statute Article 35(2), does so by affirming its commitment to the ICJ Statute and to Article 94 of the Charter (and by assuming certain financial obligations). The Article 94 commitment well may entail other commitments under the Charter. The Committee of Experts said,

the obligations of a Member of the United Nations under Article 94 include the complementary obligations arising under Articles 25 and 103 of the Charter insofar as the provisions of those Articles may relate to the provisions of Article 94, and non-members of the United Nations which become parties to the Statute (and non-parties which have access to the Court) become bound by these complementary obligations under Articles 25 and 103 in relation to the provisions of Article 94 (but not otherwise), when

272. UN Report on Switzerland, *supra* note 266, Annex ¶ 4.

273. Resolution 9, *supra* note 269, ¶ 4.

they accept "all the obligations of a Member of the United Nations under Article 94."²⁷⁴

However, this is only part of the total obligation that the U.N. Charter imposes upon Member States. The requirement of Charter Article 4(1) that, to be admitted, a State "accept the obligations contained in the present Charter" means that the State must accept *all* the obligations. The non-Member State seeking access to the ICJ plainly does not need to do as much—at least under the current (and now half-century long) disposition. The commitment to Article 94 for purposes of gaining access to the ICJ thus is an abridged version of the full commitment required under Article 4(1) of the Charter for purposes of admission to the United Nations. The less stringent requirements for ICJ participation reflect the goal of achieving universal subscription to the principle that international disputes are to be resolved by pacific means.

It is not immediately clear whether any constitutional provision would prevent the General Assembly under Charter Article 93(2) or the Security Council under Statute Article 35(2) from deciding that the non-Member State must satisfy more stringent conditions. Hypothetically, the General Assembly and the Security Council may be divided as to the role to give a State in U.N. processes, the Security Council veto preventing admission to the United Nations, but a General Assembly majority favoring the State. It would seem that the definition of a Security Council "recommendation" under Charter Article 4(2), as affirmed in the *Competence* Advisory Opinion, again would apply if a dispute arose as to the meaning of the same term under Charter Article 93(2). A conceivable—though, again, hypothetical—bargain would be the Security Council requiring as a condition for access to the Court even more stringent conditions than those for admission to membership set down in Article 4(1).²⁷⁵ The State presumably would be free to reject such terms and seek adjudication elsewhere.

The provisions of the U.N. Charter, ICJ Statute, and Security Council Resolution 9 under which States are given standing before the Court would appear straightforward. One of the main preliminary questions likely to arise in an ICJ proceeding is the question of the consent of a State to jurisdiction—for example, a question as to the effectiveness or scope of a compromissory clause for purposes of Article 36(1) of the

274. UN Report on Switzerland, *supra* note 266, Annex ¶ 4.

275. That the conditions for access to the Court by non-Member States may vary upon decision of the competent U.N. organs prompts comparison to the accession provisions of the European Union under Title VII, Art O (Final Provisions) of the Treaty on European Union. Treaty on European Union, Feb. 7, 1992, 1757 U.N.T.S. 4, 156. The E.U. accession provisions, too, may be varied from one applicant to another; but unlike the conditions for access to the Court, they actually have been varied considerably in practice.

Statute.²⁷⁶ But this assumes clarity as to the prior matter—namely, the relation to the United Nations of the State seeking access to the Court. The relation of Yugoslavia to the United Nations in the 1990s was anything but clear, and that State was engaged, both as respondent and applicant, in multiple cases in the Court. The ambiguity of the relation between the United Nations and Yugoslavia (later titled Serbia and Montenegro) has received extensive attention from writers.²⁷⁷ The matter did not have to be settled where jurisdiction was lacking.²⁷⁸ Where the problem of U.N. membership was not easily avoided, the approaches adopted were not entirely satisfactory. It still may be asked whether the Court in 2004 in truth needed to take as categorical a position as it did on the membership question. From the position that international disputes are to be settled by pacific means, perhaps it follows that the United Nations is obliged to facilitate access to the Court; this would suggest that non-admission could constitute a breach, or, at least, that failure to seek paths to standing before the Court could do so.

5. Admission and State Creation

An interpretation of the Charter that readily admits new States to the United Nations may give impetus to the creation of new States, which in turn may generally affect public order. Insofar as some of the effects are deleterious, one might ask whether responsibility arises from admission.

One of the international public goods that a new State most seeks is U.N. membership.²⁷⁹ U.N. membership, by the logic of the Charter, is conclusive as to the statehood of the entity admitted—a point on which the ICJ was clear in the *Bosnian Genocide* case.²⁸⁰ Membership brings

276. See Christian Tomuschat, *Article 36, in* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, *supra* note 264, at 588, 612–26.

277. See, e.g., Vojin Dimitrijevic & Marko Milanovic, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT'L L. 65, 81–82 (2008); cf. Yehuda Z. Blum, *Was Yugoslavia a Member of the United Nations in the Years 1992–2000?*, 101 AM. J. INT'L L. 800, 818 (2007).

278. For example, in the *NATO* cases, the United States had not consented to jurisdiction under Article 38(5) of the Rules of Court, *Legality of Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. 916, 925 (June 2); and Spain was not subject to compulsory jurisdiction because it had made a valid reservation as to reciprocity under Article 36(2) of the Statute, *Legality of Use of Force (Yugo. v. Spain)*, 1999 I.C.J. 761, 770–71 (June 2).

279. See Johan D. Van Der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1, 35–36 (2000) (discussing some of the general problems for a putative State for being excluded from the United Nations).

280. Application of Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugo.*), 1996 I.C.J. 595, 611 (July 11) (“The Court notes that Bosnia and Herzegovina became a Member of the United Nations following the decisions adopted on 22 May 1992 by the Security Council and the General Assembly, bodies competent under the Charter. Article XI of the Genocide Convention opens it to ‘any Member of the United Nations’; from the time of its admission to the Organization, Bosnia and

security;²⁸¹ it brings access to multilateral diplomacy;²⁸² it brings introductions to the network of global aid and credit institutions.²⁸³ Membership is the starting point for inclusion in the international trade regime and for protection of intellectual property rights.²⁸⁴ The significant involvement of the United Nations in maintenance of the international security architecture, including even administration of territory, is a project in which a State may participate more readily after admission.²⁸⁵ In light of the multiple dimensions of U.N. membership as an international public good, if no substantive limit is placed on admission, then the incentive for independence is increased. By contrast,

Herzegovina could thus become a party to the Convention. Hence the circumstances of its accession to independence are of little consequence.”). Yugoslavia, however, had argued that the Bosnian declaration of independence was unlawful and thus Bosnia was not a State. See Memorandum from Rodoljub Etinski, Agent of the Federal Republic of Yugoslavia, Observations of the Federal Republic of Yugoslavia Concerning the Requests for Indication of Provisional Measures (Aug. 23, 1993), available at <http://www.icj-cij.org/docket/files/91/13579.pdf> (last visited June 13, 2009) (“The Federal Republic of Yugoslavia contests the legitimacy of the Applicant. . . . [The] secession of the ‘Republic of Bosnia-Herzegovina’ [was] carried out in contravention of the Constitution of this former Yugoslav Republic, as well as the rules of international law.”); see also *id.* app. 1, at 16 (setting out international opinion that recognition of Bosnia was “premature”). The Yugoslav argument was confused by its mixture of references to the statehood of Bosnia and the credentials of the Bosnian government, which Yugoslavia argued also should have been rejected. Respecting the competence of the Bosnian government, see Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, 622 (July 11) (“[A]t the time of the filing of the Application, Mr. Izetbegovic was recognized, in particular by the United Nations, as the Head of State of Bosnia and Herzegovina.”).

281. Consider the condemnation of the invasion of Kuwait. S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990). To be sure, it is hard to conceive any other response to the unlawful invasion and forcible annexation of a State—which suggests that the security of Kuwait in 1990–1991 may be referred to its statehood. This still, if slightly less directly, refers security to U.N. admission, for, as already noted, admission is conclusive of that status.

282. See DUGARD, *supra* note 80, at 77–78 (noting the function of the United Nations as a center of multilateral diplomacy).

283. On the position of the IMF and World Bank within the U.N. system generally, see Ngaire Woods, *Bretton Woods Institutions*, in THE OXFORD HANDBOOK OF THE UNITED NATIONS, *supra* note 153, at 233–53; see also Bartram S. Brown, *IMF Governance, the Asian Financial Crisis, and the New Financial Architecture*, in INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI 131, 131–34 (Sienho Yee & Wang Tieya eds., 2001). The question of State access to finance is not limited to international public institutions. Private institutions are also unlikely to enter into credit relations with entities—or with private parties within the territory of entities—whose international legal status is insecure. This has been a consideration in seeking a resolution of the status of Kosovo.

284. Stephen Zamora, *Economic Relations and Development*, in THE UNITED NATIONS AND INTERNATIONAL LAW 232, 239–58, 280–85 (Christopher C. Joyner ed., 1997).

285. The States directly involved in discharging the U.N. mandate for Kosovo are U.N. Member States. States administering territories under Trusteeship agreements also were U.N. members, at least in most (but not all) cases. The exception was Italy in its administration of Somaliland. See GRANT, *supra* note *, at 265–66.

if the United Nations were to make clear that more is needed to obtain admission than a mere assertion of eligibility, then this would introduce a decelerating mechanism. Slowing the steps to independence in turn would present the possibility that greater prudence be exercised in taking those steps. Communities would not take admission for granted and, perhaps, in considering the possibility that they would remain outsiders to the principal international organization, they would be less precipitous in a decision to establish statehood. Nor would existing States necessarily encourage the independence of others, as for example Russia did toward Abkhazia and South Ossetia in and after August 2008.²⁸⁶ (Though, it must be said, Russian policy-makers today would have to possess the most sanguine expectations of other members of the Security Council, if they reckon these entities to stand any chance of being admitted.) The problem of “failed States”—perhaps better termed a problem of failed governments²⁸⁷—has not generally been recognized as bearing relation to the admission practice of the United Nations; but a relation—even a fairly strong relation—may be posited. If the relation is accepted as significant, then it might give further grounds for attributing responsibility in connection with admission.

B. Remoteness of the Injury

This brings us back to the problem of causation. The matters addressed above are all consequences of admission of States to the United Nations. However, as the ILC said in its Commentary to ARSIWA Article 31, “the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.”²⁸⁸ The question this Article addresses is whether admission entails responsibility such that a new obligation arises to make reparation. To spur the breakup of

286. Application of International Convention on the Elimination of All Forms of Racial Discrimination, ¶¶ 14, 15 (Geor. v. Russ.), 2008 I.C.J. 140 (Oct. 15).

287. The terminology of “failed States” and “state failure” is widely used. *See, e.g.*, GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA (2004); Robert Jennings, *Sovereignty and International Law*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 25, at 27, 30. But the terminology is problematic, not least of all for implying that it is the inhabitants of the States concerned who are principally to blame. Crawford, *supra* note 26, at 718–23. The expression in the Administration Policy on Reforming Multilateral Peace Operations, 33 I.L.M. 795 (1994), though less memorable, is more accurate: “the collapse of governmental authority in some states.” *Id.*; cf. Jean Charpentier, *Le Phénomène Étatique à Travers les Grandes Mutations Politiques Contemporaines*, in SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL L’ÉTAT SOUVERAIN À L’AUBE DU XXIIÈ SIÈCLE COLLOQUE DE NANCY 25–27 (1994) (referencing the “failed state” as a case of “degradation of internal sovereignty”).

288. ILC COMMENTARIES, *supra* note 142, at 204.

States into new States could endanger international peace and security and would be contrary to the U.N. Charter, but creating a new State is not in itself a wrongful act. And to the extent that admission of States is an impulse to State creation, admission is that much further removed from the possible breach. Though a State might seek the cover of membership in an international organization to evade responsibility for a wrongful act, such misuse of membership also seems rather removed from the decision to admit the State. The confirmatory effect of admission on statehood likewise would be difficult, if not impossible, to characterize as a wrong in itself, except, perhaps, in an extreme case, where the putative State has been brought into existence for unlawful purposes and admission would tend to further these or to obstruct efforts to counteract them. Insofar as admission facilitates the pacific settlement of international disputes by giving the new member automatic access to the ICJ, admission is quite the opposite of a wrongful act.

Thus the consequences of admission of a State to the United Nations, if they are to be taken as injurious at all, are consequences connected to admission only through a chain of causation. It is doubtful whether admission is close enough to any injurious consequences to support a claim that admission in a particular case has given rise to injuries for which reparation is due.

Relevant when considering the issue of causation is the distinction between an act and its effects. The provision which the ILC drafted relative to extension in time of the breach of an international obligation (draft article 10) says in part as follows: "The breach of an international obligation by an act . . . not having a continuing character occurs at the moment when the act is performed, *even if its effects continue*."²⁸⁹ Admission of a State to the United Nations, whatever its other legal characteristics and however extensive its effects, is "an act . . . not having a continuing character." Admission takes place by a series of decisions pursuant to a constitutional process, and the decisions are fixed in time and the timing of their effectiveness specified. Indeed, Rule 138 of the Rules of Procedure of the General Assembly, as amended, makes clear that it is upon the affirmative vote of the General Assembly that the candidate for admission is admitted. Membership, by contrast, is a phenomenon that continues from the time of admission. It is admission's most obvious effect.

The ILC was clear that an act (including an act amounting to a breach) and its effects are separate things:

289. 2005 ILC Report, *supra* note 52, ¶ 206, at 91, draft art. 10(1) (emphasis added) (addressing responsibility of international organizations). ARSIWA Art 14(1) contains the same language with respect to state responsibility. ILC COMMENTARIES, *supra* note 142, at 63.

An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.²⁹⁰

The ILC thus took account of the possibility that not all effects of a breach will be immediately proximate in time to the breach. The ILC suggests that the causal connection between the wrongful act and its injurious effects need not be extremely close to support a claim for reparation. Indeed, a party may claim reparation for relatively remote harm. This however is not a general provision respecting causation.

Draft article 34 and its corresponding provision in ARSIWA (Article 31) address causation more directly but do not offer significantly more guidance as to a standard of causation. Under draft article 34(1), which follows ARSIWA Article 31 *mutatis mutandis*, the obligation is to make “full” reparation for the injury “caused by” the wrongful act (the wrongful act being the breach of an obligation resulting from an act or omission attributable to the organization).²⁹¹ That the injury includes “any damage, whether material or moral” suggests a wide scope for the definition,²⁹² which may therefore imply that reparation is due not only for injuries very immediate to the wrongful act, but also for injuries less proximate to the act. This much is suggested by draft article 10(1) and ARSIWA Article 14(1). The difficulty is to formulate a more refined definition of the relevant scope.

State practice and the decisions of arbitral tribunals afford the best evidence of a standard of causation. They tend to illustrate not one, but multiple standards. Comment (10) to ARSIWA Article 31 sets out the range of definitions:

290. *Id.* ¶ 6, at 136. In some instances, it may be a matter of appreciation to distinguish between an act having a continuing character and the ongoing effects of an act. *Id.* ¶¶ 8–13, at 137–39. The question is, where does the act end and its effects begin?

291. 2007 ILC Report, *supra* note 11, ¶ 344, at 203.

292. See *id.* draft art. 34(2) (“Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.”).

Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable [to the wrongful act] as a proximate cause", or to damage which is "too indirect, remote, and uncertain to be appraised", or to "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of" the wrongful act. Thus causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity". But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula." The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.²⁹³

It is scarcely plausible that the United Nations, in admitting a State to membership, "deliberately" caused any harm that might result from that act. It could be, in the sense of Comment (10), that "the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule." The obligation of the United Nations with respect to international peace and security, if some of the pleadings in the *Admission* case are considered and the dissenting judges' analysis accepted, is an obligation "within the ambit" of the admission provisions of the Charter. Admission wrongfully granted, under that analysis, would include admission that threatens or breaches peace and security.

It may be that other elements beside the proximity of an act to a given harm come into play when considering causality. A case in which the elements of obligation, breach, and attribution are extremely clear

293. ILC COMMENTARIES, *supra* note 142, ¶ 10, at 204-05.

may be one in which a tribunal is readier to construe the phrase “not too remote”²⁹⁴ liberally—that is, to determine that the obligation to make reparation relates to an extensive scope of effects, even comparatively remote ones. A case in which the other elements have been determined as very close questions, by contrast, might be one in which a tribunal would “describe the link which must exist between the wrongful act and the injury”²⁹⁵ more restrictively. Yet it presents a risk of excessive judicial license to decide an element of a case without articulating a self-contained reason. The problem of causation is not easily solved. The consequences of admission of a State, except perhaps in exceptional cases, are likely to be too remote to establish the causal connection to admission requisite to support a claim for reparation.

Reparation, because it forms a distinct phase in the process of claim, nevertheless merits consideration with respect to admission of States.

VI. REPARATION

France, in the Sixth (Legal) Committee, said, “[t]he jurisprudence of the *Chorzów Factory* case should apply as much to international organizations as to States.”²⁹⁶ This means that international organizations should be subject to the maxim, as much as are States, that every instance of international responsibility entails a duty to make reparation in some form.²⁹⁷ Giorgio Gaja, as Special Rapporteur on responsibility of international organizations, said that it “would be absurd to exempt international organizations from facing reparation as the consequence of their internationally wrongful acts. This would be tantamount to saying that international organizations would be entitled to ignore their obligations under international law.”²⁹⁸

Several matters arise in connection with reparation. The sections above already have discussed problems concerning the identity of the relevant party and the causal link between possible injurious consequences of admission to the United Nations and the decision to admit. This section considers, if the act admitting a State to membership had injurious consequences, what further problems relating to reparation might arise.

294. *Id.*

295. *Id.*

296. *Fifth Report of Special Rapporteur Gaja, supra* note 108, ¶ 21, at 8 (quoting U.N. GAOR, 61st Sess., 14th plen. mtg. at 12, U.N. Doc. A/C.6/61/SR.14 (Oct. 30, 2006)).

297. *Factory at Chorzów (F.R.G. v. Pol.)*, 1925 P.C.I.J. (ser. B) No. 3, at 15 (July 26); *see also* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 835–36 (2002).

298. *Fifth Report of Special Rapporteur Gaja, supra* note 108, ¶ 22, at 8.

A. Reparation in the ILC Draft Articles

The Draft Articles on Responsibility of International Organizations, like ARSIWA, address in some detail the content of international responsibility—including especially reparation for injury and the several forms it might take. Draft articles 31 through 36 address general principles. Draft articles 37 through 43 address reparation and its forms.

The injured party in many cases will seek cessation of the wrongful act and, as provided under draft article 33, “appropriate assurances and guarantees of non-repetition.” Comment (2) to draft article 33 notes that cessation is often “the main object pursued.”²⁹⁹ Admission of a State to the United Nations, an act that takes place at a discrete time, does not present a case where the injured party (if there is one) likely would demand cessation. *Ex hypothesi* the United Nations might face a demand from “the international community as a whole” that a continuing series of decisions to admit States as members be stopped. But, it is not clear who precisely would make the demand, and whether such decisions would constitute for purposes of responsibility a single ongoing act is at best debatable. It would seem not to, for each admission decision is a constitutional act that by the terms of the *Admission* Advisory Opinion takes place separately from others.³⁰⁰ A demand for cessation therefore is not very likely. A demand for non-repetition, perhaps, is conceivable: some party might demand that the United Nations not repeat admissions that conflict with the obligations of the Organization. The ILC Commentary to draft article 33 observes that “[f]or [an] obligation [to offer assurances of non-repetition] to arise, it is not necessary for the breach to be continuing. The obligation seems justified especially when the conduct of the responsible entity shows a pattern of breaches.”³⁰¹ The definition of the term “pattern” however may not be easy to pin down.³⁰²

299. 2007 ILC Report, *supra* note 11, ¶ 344, at 202.

300. Conditions of Admission of State for Membership in United Nations, Advisory Opinion, 1948 I.C.J. 57, 64–65 (May 28).

301. 2007 ILC Report, *supra* note 11, ¶ 344, at 202; *id.* draft art. 33 cmt. 3.

302. How to establish that breaches have such a relation to one another to constitute a “pattern” is a question arising in various fields. The question arises, for example, under the Racketeer Influenced and Corrupt Organizations Act (RICO), a U.S. federal statute, the phrase in which “pattern of racketeering activity” has occasioned dispute. *See* 18 U.S.C. §§ 1961–1968 (2000). Consider also Justice Scalia’s criticism of the main definition the U.S. Supreme Court had given the phrase:

[T]he word “pattern” in the phrase “pattern of racketeering activity” was meant to import some requirement beyond the mere existence of multiple predicate acts. Thus, when § 1961(5) says that a pattern “requires at least two acts of racketeering activity” it is describing what is needful but not sufficient. (If that were not the case, the concept of “pattern” would have been unnecessary, and the statute could simply have attached liability to “multiple acts of racketeering activity”). But what that something more is, is beyond me. As I have suggested, it is also beyond the Court.

As to forms of reparation, draft article 37 (in the same terms as ARSIWA Article 34) says as follows: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."³⁰³ The draft article therefore reflects the accepted conception that reparation may take one or a combination of three forms: (i) restitution, (ii) compensation, or (iii) satisfaction. Draft articles 38 through 40 develop the three forms of reparation *seriatim*.

1. Restitution

Draft article 38 defines restitution as "to re-establish the situation which existed before the wrongful act was committed." The ILC is clear that the requirement to "re-establish the situation" is to be read narrowly—that is to say, the requirement does not "absorb[] into the concept of restitution other elements of full reparation . . . tend[ing] to conflate restitution as a form of reparation and the underlying obligation of reparation itself."³⁰⁴ Restitution means re-establishing the *status quo ante*; but it does not go so far as to involve re-establishing "the situation that would have existed if the wrongful act had not been committed."³⁰⁵ This suggests an interest in confining restitution to the situation arising immediately from the breach, rather than extending it to cover less proximate results.

Admission of a State to the United Nations is an act that certainly in principle the United Nations could reverse; this is the purpose of Charter Article 6. Where admission had breached an obligation, one therefore might speak of restitution. This would be analogous to "juridical restitution"—the "modification of a legal situation" where that situation is in breach of an obligation.³⁰⁶ However, the United Nations has never expelled a State. Article 6 scarcely even seems an operative provision of the Charter. There exists something like a settlement (developed through practice) that, once admitted, a State is not to be

Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of Circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness.

H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 255 (1989) (Scalia, J., concurring).

303. 2007 ILC Report, *supra* note 11, ¶ 344, at 208.

304. ILC COMMENTARIES, *supra* note 142, ¶ 2, at 213.

305. *Id.*

306. *Id.* ¶ 5, at 214–15; *see id.* at 215 nn.534–35.

expelled—a constitutional variant of the agreements sometimes seen in arbitrations that restitution is not an appropriate remedy.³⁰⁷

Moreover, draft article 38 refers to two conditions limiting the requirement to “reestablish the situation.”³⁰⁸ First, reestablishing the situation must not be “materially impossible.”³⁰⁹ Second, it must not “involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”³¹⁰

Expulsion of a State from the United Nations, in a narrow sense, is not “materially impossible.” The constitutional mechanisms, though unused, do exist to effect that result. But expulsion on grounds of “wrongful admission” could entail other consequences. On the text of the Charter, statehood is a central criterion for admission. It is true that admission does not make the State, so expulsion does not unmake it. Yet, as also noted, the tendency exists to view U.N. admission as a certification of statehood. It follows that the effects that might be inferred from expulsion are significant.

A further consideration against restitution as a form of reparation is that restitution could adversely affect the rights of third parties. This was the consideration in the *Forests of Central Rhodope* case, where not only had the condition of the forests changed since the respondent had wrongfully taken them, but various third parties had acquired rights in them.³¹¹ Any remedy to problems involving statehood, which tends to negate a particular State (or extensively to curtail core incidents of its international status, for example, the right to exclusive jurisdiction over its internal affairs) has serious consequences—for States have entered into treaties or engaged in transactions with or in the State, and otherwise have acted in reliance on its continued existence. To negate a State is not a path through an open field, but rather into a more tangled thicket, and so sometimes fashionable ideas about intervention, new forms of trusteeship, and the like may be as dubious as restitution of disputed forests. Expulsion from the United Nations would not necessarily entail full negation of the State expelled, but it could be a first step; the rights of the allied United Nations as against the “enemy States” in World War II and

307. See, e.g., *Gov't of Kuwait v. Am. Indep. Oil Co.*, 66 I.L.R. 519, 533 (Int'l Arb. Trib. 1982), cited in ILC COMMENTARIES, *supra* note 142, at 214; *Walter Fletcher Smith (Cuba v. U.S.)*, II R. Int'l Arb. Awards 913, 918 (Clarence Hale, Arbitrator 1929), cited in ILC COMMENTARIES, *supra* note 142, at 214.

308. ILC COMMENTARIES, *supra* note 142.

309. *Id.* art. 38(a).

310. *Id.* art. 38(b).

311. *Greece v. Bulgaria*, III R. Int'l Arb Awards 1405, 1432 (1933) cited in ILC COMMENTARIES, *supra* note 142, ¶ 9, at 216; see also *Judgement No. 97* (Oct. 4, 1965), *Leak v. Secretary-General*, summarized at *United Nations Juridical Yearbook* (1965) pt. 2, ch. 5, at 208-09, cited in *Fifth Report of Special Rapporteur Gaja*, *supra* note 108, ¶ 43, at 13.

immediately afterward suggest the direction that naturally would follow from expulsion. Even avoiding such a radical claim against the autonomy of an expelled State, the cessation of membership itself would have immediate effects, including disruption of the relations that likely will have developed as between the State and other States in the framework of the Organization.

2. Compensation

The first paragraph of draft article 39 would provide as follows: "The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."³¹² The clause "insofar as such damage is not made good by restitution" identifies restitution as having priority over compensation. Returning the situation to the *status quo ante* thus is the preferred form of reparation. Draft article 39 acknowledges that restitution may not in all situations be available or, where available, that it may not be adequate to make full reparation.³¹³ Paragraph 2 specifies that the relevant damages for assessment of compensation will be "financially assessable," a phrase intended "to exclude compensation for what is sometimes referred to as 'moral damage.'"³¹⁴ Compensation is not punitive.³¹⁵

The main cases of compensation made by the United Nations have involved specific acts carried out under U.N. mandates. The ICJ in the *Cumaraswamy* case suggested that, where the United Nations is responsible, the United Nations is obligated to compensate "for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity."³¹⁶ There is little, if any evidence, that the United Nations or other international organizations would have an obligation to make compensation for the more remote effects of policy. Thus, for example, it was not the long-term problems of the Congo for which the United Nations paid compensation but, rather, specific injuries resulting directly from specific acts arising out of the U.N. operation in the Congo.³¹⁷ *A fortiori* even more remote effects of admission of a State would not be compensable, at least under the law of responsibility as it now exists.

312. 2007 ILC Report, *supra* note 11, ¶ 344, at 209.

313. ILC COMMENTARIES, *supra* note 142, ¶ 3, at 218–19.

314. *Id.* ¶ 1, at 218.

315. *Id.* ¶ 4, at 219.

316. Difference Relating to Immunity from Legal Process of Special Rapporteur of Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 88 (Apr. 29).

317. 2007 ILC Report, *supra* note 11, at 209–10, draft art. 38 cmt. 1.

3. Satisfaction

Satisfaction, the third form of reparation treated in the draft articles, characteristically involves “an apology or an expression of regret.”³¹⁸ The ILC Commentary to draft article 40 suggests as one example of satisfaction on the part of an international organization the apology by NATO for the bombing of the Chinese embassy in Belgrade.³¹⁹ The Commentary also notes the statements in the U.N. Secretary-General’s reports concerning Srebrenica and Rwanda, expressing, respectively, “deepest regret and remorse” and “bitter[] regret.”³²⁰ There would be no obvious point to apologizing for, or expressing regret over, admission of a State. Indeed, it is scarcely conceivable that an organization would do so with respect to one of its members. Injuries resulting from admission would not be compensable by satisfaction.

B. *Reparation in Practice?*

As considered above, impediments exist to treating admission of a State to the United Nations as a wrongful act for which reparation might be demanded. That in principle the law of responsibility could apply to admission does not necessarily mean that it actually would. The question would arise whether States or international organizations in practice have acted to implement responsibility in this field.

Two areas of international practice possibly relevant for present purposes are international development assistance and intervention. Both development assistance and intervention might be seen as measures taken to meet an obligation toward certain admitted States. The General Assembly has addressed development *in extenso* and from time to time has suggested that it could be evolving into a right.³²¹ It also has formulated a “responsibility to protect,” which would suggest, but does not create, an obligation to intervene under certain conditions.³²² If development assistance and intervention were to become obligatory on the part of those in a position to perform them, and if they then were to be characterized in a framework of international responsibility, then they might further be characterized as reparation. Many States that receive development assistance, whether in the form of grants or credit, are comparatively new States, including new States admitted to the United Nations during the heyday of decolonization from the mid-1950s

318. *Id.* at 211, draft art. 40 cmt. 1.

319. *Id.* at 212, draft art. 40 cmt. 4.

320. *Id.* draft art. 40 cmts. 2–3.

321. See 2005 World Summit Outcome, *supra* note 27, ¶¶ 15–56; Declaration on the Right to Development, *supra* note 27.

322. 2005 World Summit Outcome, *supra* note 27, ¶¶ 138–39.

through the 1960s.³²³ Many States that are the subject of international intervention belong to the same category. Significant international practice exists in the field of development assistance, and there are numerous cases of more direct forms of intervention. The point here is not to review the practice; writers have considered it in detail.³²⁴ The point instead is to ask whether acts done in the fields of development assistance and intervention constitute evidence of substantive obligations with respect to newly created (and newly admitted) States.

Failed government, or government in breach of basic obligations to its citizens, has been identified as a ground for intervention.³²⁵ Domestic jurisdiction is presumptively exclusive as against international intervention, and Article 2(7) of the Charter enshrines this position, which was well-established in customary international law as well. Notwithstanding Article 2(7), interventions have taken place on the asserted legal basis that a responsibility—or perhaps a right—exists to intervene to correct failings in government. Any use of force by a State or international organization against a State is a serious matter for international peace and security. The phenomenon of the failed government, whatever its indeterminacy, therefore is significant for the law concerning international peace and security.

Intervention to “repair” or “correct” failed governments has been proposed (and carried out) under more than one formula. Conspicuous cases of intervention actually executed, such as Operation Iraqi Freedom, have replaced governments that did not respect the basic rights of the people. Other interventions, such as in Haiti and the Solomon Islands, have aimed to restore government where it has broken down, been unlawfully displaced, or altogether disappeared. Yet in spite of the serious questions intervention raises—or perhaps because of the

323. Consider, for example, the intensive activity of the United Nations in States in Africa south of the Sahara, all but three of which gained independence during the main period of decolonization. UNDP-Africa, <http://www.undp.org/africa/> (last visited June 13, 2009).

324. On armed intervention, see, for example, HILAIRE MCCOUBREY & JUSTIN MORRIS, *REGIONAL PEACEKEEPING IN THE POST-COLD WAR ERA* (2000); GEORG NOLTE, *EINGREIFEN AUF EINLADUNG: ZUR VÖLKERRECHTLICHEN ZULÄSSIGKEIT DES EINSATZES FREMDER TRUPPEN IM INTERNEN KONFLIKT AUF EINLADUNG DER REGIERUNG* 392–95, 409–18 (2000); see also THOMAS JAYE, *ISSUES OF SOVEREIGNTY, STRATEGY, AND SECURITY IN THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) INTERVENTION IN THE LIBERIAN CIVIL WAR* 139–263 (2003); *PEACE KEEPING AS A SECURITY STRATEGY IN AFRICA: CHAD AND LIBERIA AS CASE STUDIES* (Margaret A. Vogt & L. Salawu Aminu eds., 1996).

325. See Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 29 (1999) (saying that intervention may be justified where there have been committed “large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace”).

intractability of those questions—no generally applicable legal theory has been articulated on which all such interventions might be based.

A number of theories exist. Consent by the government of the State subject to intervention is a sound theory, where one can convincingly apply it.³²⁶ Although for all States domestic jurisdiction is presumptively inviolable, any State may waive its monopoly in favor of a foreign intervening power. The European Commission, referring to its program of support for the electoral systems in developing democracies, said that consent is “of vital importance for the European Union’s external relations activities, which could otherwise be seen as undue interference in the domestic affairs of third States.”³²⁷ However, a State or international organization can apply this theory only where good evidence exists that the State targeted for intervention has freely given its consent. Obtaining such evidence often will be the problem. Consent is difficult to ascertain where the government has ceased to function. And it is, again, where government has ceased to function—or functions in breach of basic obligations and is unlikely to stop of its own accord—that calls for intervention.

Another legal basis for intervention is that the rules protecting basic human dignity have developed to the point that national boundaries no longer insulate offenders from international law. This reflects the shift of international law toward greater cognizance and protection of the individual. But, notwithstanding the increased status of the individual under international law, States remain the principal legal persons at international level and, apart from rare exceptions, advances in international human rights law are rooted in the consent of a State to be bound by a relevant instrument. The increase in substantive and procedural protections for individuals within national boundaries has been generally consistent, then, with the traditional understanding of the autonomy of the State. Human rights law, if it continues to gain leverage, someday may exist independent of the consent of the States subject to it. But, for now, as a basis for intervention in cases of failed government, the human

326. The practice to 1999 is considered in NOLTE, *supra* note 324; see ILC, *Fourth Report on Responsibility of International Organizations*, ¶ 13, U.N. Doc. A/CN.4/564 (Feb. 28, 2006) (prepared by Giorgio Gaja) [hereinafter *Fourth Report of Special Rapporteur Gaja*] (“A recent example is Indonesia’s invitation to the European Union, contributing countries of the Association of Southeast Asian Nations (Brunei Darussalam, Malaysia, the Philippines, Singapore, and Thailand), Norway, and Switzerland, for deployment of an Aceh Monitoring Mission.”).

327. 2007 Comments, *supra* note 31, at 15; see also The Secretary-General, *Report of the Secretary-General on Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, delivered to the General Assembly*, U.N. Doc. A/49/675/Corr.1 (Nov. 30, 1994); R. Sapienza, *Considerazioni sulle Attività di Assistenza e Monitoraggio Elettorale dell'ONU*, in 88 RIVISTA DI DIRITTO INTERNAZIONALE 647 (2005), cited in *Fourth Report of Special Rapporteur Gaja*, *supra* note 326, ¶ 12, at 4 n.10.

rights régime tends to meet the same limit—namely, consent of the State concerned.

Another theory is that the rights of certain States are not equal to the rights of others. A sort of “quasi-sovereignty” or “semi-statehood” is said to exist, where government is deficient in the sense(s) indicated. Whatever its other qualities, this theory is distinctive, in that it does not rely (initially or ultimately) on the consent of the State in which the intervention takes place. If conserving basic principles of the legal system is a policy objective, then this is the most problematic theory of intervention. It invites the following response, which, in turn, leads back to the main consideration of the present Article: if existing States have approved the admission of a given “failed State” into the United Nations, then they have *ipso facto* accepted it as a State for all purposes of international law, and their acceptance has been communicated in an authoritative statement which scarcely can be qualified, much less repudiated, without casting doubt on that most fundamental rule that one’s commitments are to be honored. Where the United Nations has managed or overseen long-term projects of assistance, such as in Bosnia and Herzegovina and in Cambodia, this has taken place with the formal consent of the beneficiary. The United Nations has never imposed trusteeship on a State. Article 78 of the Charter in any case makes clear that such an arrangement is not available for a Member State.³²⁸ Indeed it would be paradoxical to say that an obligation to maintain and consolidate statehood is to be satisfied by intervention. To take over core functions of the State without its consent would derogate statehood. Intervention is not readily explicable as a form of reparation for inducing the accession to independence of “unprepared” or “unready” States.

Then, perhaps, development assistance could be categorized as reparation. As noted above, development assistance, including through various international agencies—for example, the IMF and United Nations Development Programme—is an established part of international practice. The General Assembly, as noted, has adopted statements concerning development, but the texts are non-binding and at most point to general principles.

As such, little, if any evidence exists that States have ongoing affirmative obligations to give assistance once they have voted to admit an entity as a U.N. member. By their vote in favor of admission they certainly have expressed their view that the entity is a State for purposes of international law. There are *jus cogens* prohibitions, but these apply, largely if not in whole, whether or not a community is a State. What is

328. See Dietrich Rauschning, *Article 78, in THE CHARTER OF THE UNITED NATIONS*, *supra* note 90, at 1117, 1117–18.

perhaps distinctive about the vote of admission is that it signifies the judgment of the voting Member State (reached by whatever internal process) that the candidate has the ability to fulfill the purposes and principles of the United Nations. Admission signifies the same, as to the judgment of the Organization as a whole. Assuming that one of the principles of the United Nations is that internal public order should be maintained (at least at a level necessary for basic human dignity), then the voting Member State and the Organization have made a representation that the candidate is capable of respecting that principle. In some circumstances, a representation may have the effect of estoppel on the party making it.

Transfers of wealth in the form of international aid and credit, and the numerous interventions undertaken to restore or to build public order in States with failed or failing governments might be described as a sort of tacit reparation. It comes as little surprise, however, that States, when they give aid to or intervene in underdeveloped States, do not express the view that they are obliged to do so. Even where damages are directly connected to certain conduct, States have resisted acknowledging responsibility.³²⁹ For example, the Soviet Union made an *ex gratia* payment to Canada in connection with the crash of a radioactive satellite on Canadian territory.³³⁰ The payment equaled a significant part of what Canada had claimed—roughly half—but the Soviet Union would not accept that this was compensation for a wrongful act.³³¹ States would all the more resist acknowledging very general obligations with respect to the maintenance and consolidation of the independence of new States. To characterize the various projects of “State building” (or rebuilding) as reparations would import a mandatory element into that practice, which would be entirely unacceptable to the most active States. The main proposed addition to international legal principles in the field of restoring public order in States with weak governments therefore has not been by way of assertions that responsibility might attach to States for their own actions taken—for example, Security Council votes affirming fitness under Article 4(1). The “responsibility to protect” puts the emphasis in-

329. *Fifth Report of Special Rapporteur Gaja*, *supra* note 108, ¶ 25, at 9.

330. For an inventory of satellite debris collected, see Comm. on Peaceful Uses of Outer Space, *Note Verbale Dated 19 December 1978 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General*, U.N. Doc. A/AC.105/236/Annex (Dec. 22, 1978).

331. See Protocol on Settlement of Canada's Claim for Damages Caused by “Cosmos 954,” Can.-U.S.S.R., Apr. 2, 1981, 20 I.L.M. 689 (1981); ILC COMMENTARIES, *supra* note 142, ¶ 13, at 222–23. Consider also the position of the sending States comprising IFOR and SFOR in the former Yugoslavia, which “have taken it upon themselves to settle any claims for damages, at the same time . . . disclaiming all legal liability.” 2005 Comments, *supra* note 146, at 63 (comment of Germany).

stead on conduct within the underdeveloped State—after all, such a “responsibility” implies protection *from* something; all the better for the protecting States that it not be from their own past decisions.

Serious questions prior to reparations remain. Not least of these are the questions of the allocation of responsibility as between Member States and the Organization, and the content of the obligations concerning admission. If one insisted that each logical step—from some primary obligation to a secondary obligation to make reparation—be supported by observed practice and established law, then there scarcely could be any consideration at all of the topic of responsibility for admission to the United Nations. It is so underdeveloped that the gaps are many and wide.³³²

It may be that the progressive development of humanitarian and human rights law eventually will prove to protect the inhabitants of under-governed or mal-governed States. To treat the problem as one of responsibility in the stricter sense, of attachment of legal consequences to certain States or organizations for their own stated and implicit assurances given at the time of independence of new States or at the time of admission, would be at once a more conservative approach and more radical. It would belong to that established realm of international law concerned with relations between States and international organizations, in contrast to an approach that relies on a consolidating international human rights law; but it would have the potential to convert much of the elective activity of international aid and intervention into obligation. In this latter respect, it would depart significantly from established rules.

CONCLUSION

The foregoing sections have considered both the transsubstantive or secondary rules of responsibility, especially as the ILC has examined these since 2002 in connection with international organizations, and a specific field of possible international obligation as yet little considered as such: the admission of States to the United Nations. In view of the present state of legal development, the following six points may be made:

332. The Special Rapporteur on Responsibility of International Organizations, when considering satisfaction as a form of reparation, also encountered the problem of scarcity of relevant practice. It therefore was necessary to refer to examples of acts akin to satisfaction but done without express reference to the existence of a breach of an international law obligation. *Fifth Report of Special Rapporteur Gaja, supra* note 108, ¶ 49, at 15.

- (i) It follows from general considerations of rule of law that certain rules of international law apply to the principal organs of the United Nations and to the Organization as a whole. At a minimum these include the rules of international law of peremptory character (*jus cogens*), general rules of treaty interpretation, and the rules set out in the U.N. Charter and developed under the Charter in practice.
- (ii) A law of responsibility of the United Nations or of international organizations generally remains underdeveloped in the matter of the allocation of responsibility between Member States and the organization. Nevertheless, the principal organs of the United Nations and the Organization as a whole can perform acts attracting international responsibility; and the Member States, though presumed separate for purposes of responsibility from the international organizations to which they belong, are not absolutely protected from responsibility for the acts of those organizations.
- (iii) A Member State is obliged when casting a vote on an application for admission to membership to do so in accordance with Article 4 of the Charter, as interpreted in the advisory opinions of the ICJ and developed in practice. However, the considerable discretion vested in each Member State as to the internal processes leading to a vote under Article 4 makes it highly unlikely that a State's vote could be the basis for attaching responsibility to the State for that act. General considerations of the immunity of the constituents of a parliamentary body for their votes taken in accordance with its rules and procedures perhaps further render doubtful that a State could be held to have breached an obligation by the way it cast a vote under Article 4.
- (iv) The United Nations is obliged when considering an application for admission to membership to do so in accordance with Article 4 of the Charter, as interpreted in the advisory opinions of the ICJ and developed in practice. The position of the United Nations in matters of admission is to be distinguished from the position of individual Member States casting votes, insofar as the resultant decision relative to an application for admission to membership is a decision of the Organization, not of the Member States. The existence of mechanisms to evaluate applications for admission and the opportunity to communicate reasons for an affirmative decision (for exam-

ple, in the Security Council resolution recommending admission and the General Assembly resolution effecting admission) furnish a starting point for a system of accountability of the United Nations for the acts of its principal organs under Article 4. The mechanisms in practice have been little used.

- (v) The purpose of the United Nations to promote international peace and security is relevant to the decision of the United Nations to admit a State as member and may add to the obligations arising under Article 4.
- (vi) The foregoing point would suggest that admission of an applicant should be denied or delayed where there is reason to believe that the applicant is not capable of maintaining the various incidents of independent statehood; or its independence is likely to cause regional or general degradation of security. Opinion and practice however show that admission of States to the United Nations is carried out instead with a view to achieving universal participation in the Organization.

Opinion and practice do not contain evidence to date of any significant development of responsibility or accountability for the admission of States. Individual States, and to an extent organized international society, have in practice acted in certain instances to secure the statehood of entities admitted to the United Nations as against doubts as to their ability to exist as independent States (for example, Bosnia and the Congo). They also have acted to ameliorate negative effects on international security that might arise directly or indirectly from admission (for example, from admission of the FYROM). To date, this is far from a complete development; and it contains little or no mandatory aspect. The possibility exists, to be sure, of future development. As the ILC said in its Commentary to ARSIWA Article 36, "the categories of compensable injuries . . . are not closed."³³³

333. ILC COMMENTARIES, *supra* note 142, ¶ 8, at 221.